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New York (State) Reports. Supreme Court.

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IN THE

SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

BY R. M. STOVER,
REPORTER.

VOLUME LXVI.

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PRACTICE REPORTS.

SUPREME COURT.

JOSEPH CLADY agt. DORCAS A. WOOD.

Arrest — Answer — Time to answer after arrest — Code of Civil Procedure, section 566.

Where an order of arrest is procured and executed more than twenty days after the service of the summons and complaint, the defendant has, by section 566 of the Code of Civil Procedure, twenty days after such arrest to serve an answer.

Albany Special Term, August, 1883.

MOTION to vacate a judgment.

A. C. Griswold, for defendant and motion.

Townsend & Townsend, for plaintiff and opposed.

WESTBROOK, J. — 'The summons and complaint in the action were served on the defendant May 9, 1883. The complaint was for the conversion of personal property, and the defendant, who is a female, did not appear in the action nor answer the complaint in twenty days after its service.

On June 4, 1883, the plaintiff, upon facts not set out in the complaint, obtained an order of arrest upon which the defendant was arrested on July 14, 1883, and held to bail. On July 26, 1883, twelve days after the order of arrest was executed, the defendant appeared in the action, serving on that day, by an attorney and by mail, a notice of appearance and an answer. These were both returned two days after their service upon the grounds that they were not served within twenty days after the service of the summons and complaint, and that the court had made an order for judgment in the action. On August 1, 1883, the plaintiff entered judgment in the action.

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without notice to the defendant's attorney, which judgment the defendant moves to vacate as irregular, because, as her attorney contends, she had, by section 566 of the Code, twenty days after the arrest in which to answer.

The section of the Code referred to is as follows: "Except when an order of arrest can be granted only by the court a defendant *arrested before answer* has twenty days after the arrest in which to answer the complaint, and judgment must be stayed accordingly."

The counsel for the plaintiff insists, that because section 421 of the Code requires a notice of appearance, or an answer to be served within twenty days after the service of the summons and complaint, that the clause of section 566, which reads, "arrested before answer," should be construed as if it read, "arrested before the time to answer has expired." There are two objections to this view, and they are these:

First. It would insert words in the section which are not there. The words "before answer" are not of doubtful import, and they must be held to be, when read in connection with those which immediately follow, and which give twenty days to answer "after the arrest," and a stay of judgment for that prisoner, better evidence of legislative intent, than a resort to other portions of the Code to ascertain it. The general rule is, that an answer must be served within twenty days, as section 421 directs, but when an order of arrest is made, the exception created by section 566 applies, and the twenty days in which the answer is to be served begin to run after the service of the order of arrest, and not from the date of the service of the summons and complaint, and so the section explicitly declares. The reason for this is obvious, and its statement brings us to the next answer to the plaintiff's construction, which is:

Second. When no order of arrest has been procured, the defendant may be unwilling to incur the cost of a defense of the action. When, however, the arrest has been made under an order, his or her situation to the action is changed, and

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such changed condition may make a defense necessary, and when the defense has become necessary to give the defendant the ordinary time, twenty days, to make it, the time within which it is made must begin to run from the arrest.

The case of *Barker agt. Wheeler* (23 How. Pr. R., 193), is relied upon by the counsel of the plaintiff to sustain their position. In that case, in which an order of arrest was made and judgment docketed on the same day, the court did hold under section 204 of the old Code, that a motion, after judgment, to vacate the order of arrest could not be entertained. It is to be assumed that section 183 of the old Code, the provisions of which are covered by sections 566 and 567 of the present Code, was not then in force (it was not, as the amendment to section 183 was passed April 23, 1862, Laws of 1862, pp. 846, 848, and the order of arrest was September 25, 1861), because judge MULLEN (*see pp.* 196, 197), in delivering the opinion of the court regrets the conclusion to which he came, and states: "A case has occurred which the codifiers did not anticipate, and which requires legislative interference to prevent injustice." The date of the enactment of section 183 of the old Code was, as already stated, April 23, 1862, and the section as amended was not operative so as to affect the action in which judge MULLEN wrote his opinion. If it had been the decision must have been otherwise, for that section (183) declares: "But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant as provided by law, before the docketing of any judgment in the action, and the defendant shall have twenty days after the service of the order of arrest in which to answer the complaint, and to move to vacate the order of arrest, or to reduce the amount of bill." (See in this connection *Pelo agt. Clukey*, 36 How., 179, in which by force of section 183, as amended, it was held that a motion to vacate the order of arrest after judgment could be made. See close of opinion of JAMES, J.) This is too clear for comment, and its plain and explicit

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provisions sustain the view already taken of section 566 of the present Code, which as to the time to answer is a substitute for it and throw light upon the intent of the provision therein made. In fact it is impossible to read either section 183 of the old Code, or sections 566 and 567 of the present, without reaching the conclusion that twenty full days are given to a defendant after arrest, either to answer the complaint, or to move to vacate it.

The answer served should have been accepted. The judgment is irregular and must be vacated. As, however, the practice is somewhat obscure, no costs, to be paid at present, will be imposed, but if the defendant succeeds in the action she shall be allowed to tax as a part of her costs, ten dollars for this motion.

SUPREME COURT.

DAVID S. DESSAU agt. DAVID I. JOHNSON, impleaded, &c.

Bankruptcy — Effect of plaintiff being adjudged a bankrupt after action commenced — In whose name action to be prosecuted.

Where, after action was commenced, the plaintiff was adjudicated a bankrupt and an assignee of his property and estate was appointed:

Held, that the bankrupt had no legal right to maintain the action after the appointment of an assignee; and upon these facts being established the complaint should be dismissed.

The assignee is not absolutely bound to prosecute the action, but if he elects to proceed it must be in his own name and not in that of the bankrupt.

Special Term, March, 1883.

Benedict, Taft & Benedict, for plaintiff.

Siegmund Spingarn, for defendant.

VAN VORST, J. — The defendant Gallagher, in his supplemental answer, alleges that the plaintiff was duly adjudicated

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a bankrupt under the laws of the United States by the district court for the southern district of New York, and that such proceedings were had that David V. Arquimbau was appointed and qualified as assignee in bankruptcy of the plaintiff and all his property, and that the plaintiff has no interest in nor any right to maintain this action.

The matter alleged in the supplemental answer was proved on the trial, and upon that ground and others the defendant's counsel asked for a dismissal of the complaint. It is difficult, in season, to escape the force of the defense set up in the supplemental answer. The action is prosecuted and brought to trial in the name of the bankrupt as plaintiff, and yet the proceedings in bankruptcy divested the plaintiff of all the property and rights therein which he possessed at the time of the appointment of the assignee. These passed to the assignee, who was bound to administer the same for the benefit of the bankrupt's estate and his creditors.

It would be an anomalous proceeding which would allow a bankrupt, an assignee of his property and estate having been appointed, to prosecute a suit in his own name and in that way recover moneys which his assignee should receive for the creditors of the bankrupt. This is not a technical but a fundamental objection, and is sustained as well by the letter as the spirit of the Federal laws on the subject.

If the bankrupt can recover in such a case, or if a suit may be prosecuted in his name to judgment, what assurance is there that his creditors will receive one cent of the recovery? Being the plaintiff on the record, he would be entitled to take the control of the moneys recovered, and might apply them to his own, instead of the use of his creditors. It is true that the bankrupt has an interest, but it can scarcely be said to be a legal one. He doubtless has a concern, as every honest man should have, that his debt should be paid, but the application of his means to that end rests with the assignee in bankruptcy. He has the legal power, and he only, to collect and apply the assets.

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It is quite evident that the learned counsel for the plaintiff felt the force of these objections, for on his points he urges, that the assignee in bankruptcy determined to carry on this action, which was begun before the proceedings in bankruptcy were instituted, and had obtained leave to file a supplemental complaint. But the assignee has not gone far enough in that direction. He omitted a necessary step. He should have caused himself to be substituted as the plaintiff in the action, and have thus secured the legal control to the proceedings. The assignee might elect to proceed in the action, or he might refrain. If he did not chose to proceed in an action before commenced, in the bankrupt's name, it must come to an end, as the bankrupt has no legal right to maintain the action after the appointment of an assignee.

Section 5047 of the United States Revised Statutes provides that the assignee may have like remedy to recover, in his own name, all the estate, debts and effects, as the debtor might have had, if the decree in bankruptcy had not been rendered. And further, that if, at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor, the assignee shall, if he requires it, be admitted to prosecute it in his own name in like manner, and with like effect, as if it had been originally commenced by him.

The fair and reasonable construction to be given to that section is, that the assignee shall not be absolutely bound to prosecute the action, but if he elects to proceed, it must be in his own name, and not in that of the bankrupt. An assignee in bankruptcy should not be allowed to shelter himself behind a mental conclusion, not formally expressed, to prosecute an action in the name of the debtor. He should himself assume all the ordinary risks, expenses and burdens of the litigation, to which a party to the record is subject.

It is stated in *Bump's Law and Practice of Bankruptcy* (p. 144), that when a right of action passes to the assignee in bankruptcy, he must prosecute the suit in his own name, and

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not in the name of the bankrupt who is "*civilitu mortuus*." The only exception to this rule, so far as I know, is that which allows a bankrupt to continue the prosecution of an action in his own name for the recovery of an article which is set apart to him as exempt, and which does not pass to the assignee. (*Scott agt. Wilkie*, 65 N. C., 376.)

It is suggested however that the Code of Procedure allows the action to proceed in the name of the bankrupt. I am referred to no section or provision of the Code which favors such contention. The provisions of the bankrupt law must however control in this respect, and its provisions must be adhered to. The rule in equity is that if the assignor sues in his own name, "he is turned out of court." The real party in interest must be the plaintiff. For the above reasons alone, the plaintiff's complaint should be dismissed. But the same result follows from a construction of the entire merits. The evidence leads to the conclusion that the sale by Johnson to Dessau was not a real or honest transaction. Johnson was in debt, and one or more suits were pending against him, and hastening to judgment. The plaintiff's statement as to the consideration paid, and the sources from which the money came, are contradictory, inconsistent and quite unsatisfactory; and I am persuaded that the property seized by the judgment creditor was liable to be taken as that of the judgment debtor. The transaction between the plaintiff and the judgment debtor was not initiated or consummated in good faith, but was resorted to for the purpose of hindering and delaying the creditors or the judgment debtor.

The result is that the complaint of the plaintiff must be dismissed on the merits, with costs.

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SUPREME COURT.

ROBERT V. ANDERSON agt. THE MARKET NATIONAL BANK.

New trial — Rule as to granting, on the ground of surprise or newly discovered evidence.

New trials are only granted where surprise arises in relation to the facts proved, and not where surprises arise in relation to the rulings of the judge upon points of law.

Where, upon a trial, the plaintiffs had stated they would go to the jury upon the evidence as it then stood, and the court adjourned till the next day for counsel to address the jury, another judge at special term should not grant a new trial for the refusal of the trial judge to open the case the day following and take further evidence, when the witness on the other side upon the same subject has been dismissed the court and had left the state.

The granting of new trials upon the ground of newly discovered evidence is generally, if not universally, confined to cases where the newly discovered evidence has an application to the issues that have been tried, rather than to cases where the new evidence is alone applicable to an issue that is to be framed hereafter by amendment, and which the court may or may not allow.

The rule is that courts will not grant a new trial unless the newly discovered evidence would probably change the result of the former trial.

New York Chambers, November, 1883.

Wakeman & Latting, for defendants.

Niles & Bagley, for plaintiff.

POTTER, J. — This is a motion for a new trial upon the grounds, as stated in the notice of motion: "First. Of newly discovered facts and evidence." "Second. Upon the grounds of surprise as to the rulings of the court." I have read the papers furnished upon the motion with some degree of attention and care on account of the nature of the controversy and the position of the parties and their counsel; and I am brought to the conclusion that, tested by the well settled rules governing applications for new trials upon the ground

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of surprise and newly discovered evidence, this application must be denied.

The action was brought to recover of the defendant the proceeds of two checks negotiated at defendant's bank, and placed to the credit of one Haigh, upon the distinct allegations in the complaint that said checks and their proceeds belonged to plaintiff, were delivered to said Haigh for the purpose of paying two certain notes on which plaintiff was liable, and falling due the day the checks were delivered to Haigh, and that the same were diverted from the purpose for which they were delivered to Haigh, and the proceeds appropriated to his own use by being placed to his credit at the bank, and the bank had notice of these facts. The answer was a denial of these allegations.

The principal issue, and the one upon which the action would be mainly and obviously determined, was whether the bank had notice. Now it behoves the parties to produce the evidence upon the trial in relation to notice to the defendant. Each party produced such evidence as he had or thought it advisable to produce and rested. Then, as is usual, came requests from both parties that the court direct the jury how to find, and what to find; and that led to a discussion between the counsel, and to some intimations from the court in relation to the evidence and the principles of law involved in the case, as to the liability of the defendant, if it paid the proceeds of these diverted checks to said Haigh or his assigns after notice. It does not seem to me there was anything very novel or surprising in the intimations of the court upon the occasion. Still the defendant's cashier, who was in court at the time, and had been used by the defendant as a witness upon the question of notice, makes an affidavit upon this motion that he was taken by surprise at the judge's rulings upon the subject of notice. I am myself somewhat surprised at his sworn statements that he was surprised by the rulings. I observe, however, that the defendant's counsel does not state in his affidavit that he was surprised at the

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rulings, though perhaps he was, but is not willing to confess it. Still there need not be much delicacy about it, for I imagine that counsel, both the unlearned and the learned, are frequently surprised at the judge's ruling; the former that so many of the rulings are sound, and the latter that so few of them are sound. But new trials are only granted where surprise arises in relation to the facts proved, and not where surprises arise in relation to the rulings of the judge upon points of law. If the latter practice should come to prevail, there would, indeed, be "no end to litigation."

After the discussion had taken place and the court had intimated its views, both parties substantially stated they would go to the jury upon the evidence as it then stood, and the court was adjourned till the next day for counsel to address the jury. The next day the defendant's counsel desired to put in some further proof upon the subject of notice. The court refused the application upon the ground (among others, probably) that the plaintiff's witness upon that subject had been dismissed the court and had left the state; and I do not think another judge at special term should grant a new trial on account of the refusal of the trial judge to open the case and take further evidence under the circumstances. Another ground on which a new trial is asked is that of newly discovered evidence. It is the misfortune of this newly discovered evidence that it has no relation to the question of notice or tendency to relieve the defendant's grievance in not being allowed to put in further evidence upon that point; nor has the newly discovered evidence any relevancy to the pleadings in the case. The newly discovered evidence has relation to payment, by the assignee of Haigh, of the plaintiff's claim against the defendant. There is no allegation or pretense of payment in the answer, and in order to make it relevant, defendant gives notice that he applies for an amendment of the answer, to make the newly discovered evidence relevant and admissible upon the new trial.

The granting of new trials upon the ground of newly dis-

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covered evidence is generally, if not universally, confined to cases where the newly discovered evidence has an application to the issues that have been tried, rather than to cases where the new evidence is alone applicable to an issue that is to be framed hereafter by amendment, and which the court may or may not allow. It would be somewhat embarrassing for the court to grant a new trial with a view to another trial upon another issue, and the court should refuse to allow the new issue to be framed.

But there are other objections to granting a new trial for the purpose of pleading payment, which cannot be disregarded without departing from the established rules of practice. This action was commenced in March, 1880. Haigh made an assignment for the benefit of his creditors, including plaintiff for the amount of these two misappropriated checks, in December preceding, and it is claimed (but denied under oath) that the assignee paid some \$1,790 to the plaintiff upon this claim. The trial was had in April, 1883. The defendant knew of the assignment, and actually paid to the assignee two thousand and more dollars, out of the proceeds of the diverted checks. The defendant and assignee live in New York city. How is it that the defendant never learned of this payment until after this trial, and its counsel was not instructed to plead payment to that extent? If it was learned so soon after the trial, why was it not learned in the two years or more that elapsed between the commencement of the action and the trial? The affidavit of defendant fails to show how or by what means it was learned at all, and are entirely silent as to whether any inquiry was ever made of the assignee or anyone to ascertain whether anything had been paid or not. There is no diligence or effort shown upon the part of defendant to learn whether payment had been made. But a complete answer to the application presents itself in this, that it is positively sworn by Mr. Barber, who is in a position to know, that not one cent has been paid by the assignee upon this claim, either in cash or indirectly

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by the issue of stock to plaintiff. Now, the rule is that courts will not grant a new trial unless the newly discovered evidence would probably change the result of the former trial. Hence, if the pleadings were amended so as to admit of proof of payment, payment in fact would not be proved.

The motion must be denied, with ten dollars costs.

N. Y. CITY COURT.

ARTHUR W. KIPLING *et al.* agt. DONALD R. CORBIN.

Attachment—When threats by debtor that he will make an assignment with preferences no ground for—When there is not such a concealment as to warrant the maintenance of an attachment.

Although there is no positive proof of the removal or concealment of property with intent to defraud creditors, yet circumstances sufficient to establish in law such intent would justify its being upheld.

That defendant threatened to make an assignment with preferences, unless used in a coercive manner, furnishes no ground for an attachment.

Where the papers upon which an attachment was issued showed that the defendant was indebted to the plaintiff for goods sold and delivered, that defendant was insolvent and made an exhibit of his liabilities and assets to plaintiff. The cash on hand and book debts were set forth in a memorandum, but not the value of the stock; but such value was discussed, and the amount they would bring at a final sale was a subject of conversation. It appeared that the articles manufactured were nearly all in an unfinished state and not readily marketable; and the plaintiff was cognizant of all these facts, and knew the goods on hand and was a good judge of their value:

Held, that what this value of the stock was, was a subject of fair conjecture and it cannot be held that there was any such concealment as to warrant the maintenance of an attachment.

At Chambers, October, 1883.

MOTION to vacate an attachment.

Rockwell & Pearson, for motion.

Samuel Greenbaum, opposed.

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HAWES, J. — A careful consideration of the papers submitted herein has led me to the conclusion that this attachment should be vacated. It is admitted that there is no positive proof of the removal or concealment of property with intent to defraud creditors, but circumstances sufficient to establish in law such intent would justify its being upheld. It appears by plaintiff's affidavit that the defendant threatened to make an assignment with preferences. This is denied by defendant, but even if true it would furnish no ground for this provisional remedy (*Evans* agt. *Warren*, 21 Hun, 547), and I do not find evidence sufficient to warrant a belief that it was used in any coercive manner, nor are the circumstances in this case such as to bring it within the ruling in *Anthony* agt. *Stype* (19 Hun, 265). The determination of this motion depends therefore upon whether there was any concealment of property fairly inferable from the evidence offered as to the interviews of October seventeenth and eighteenth. The liabilities of defendant are not denied by plaintiff, and the only question left is whether he concealed any assets. The cash on hand and book debts were set forth in the memorandum, but not the value of the stock. It is quite clear, however, that they were discussed, and the amount which they would bring at a forced sale was a subject of conversation. It appears that the articles manufactured were nearly all in an unfinished state and not readily marketable, and that plaintiff was cognizant of all these facts, and knew the goods on hand and was a good judge of their value, as appears in his additional affidavits. What their value was was therefore a subject of fair conjecture, and in view of such a condition of things I fail to see how it can be held that there was any concealment in that regard. It appears that defendant's business was an entirely new one and involved the manufacture of machinery for a particular purpose, and of necessity is somewhat venturesome in its character. If the party is successful, it often proves very remunerative; but, if otherwise, it is equally disastrous, as the machinery

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and stock often sell for the trifling value of old material. It is a just inference, and one wholly consistent with well known business experience, that the assets of such an enterprise are relatively very small in comparison with the outlay. It seems to me that this is substantially defendant's condition, and in the light of the affidavits submitted upon this phase of the case I cannot hold that there was any such concealment as to warrant the maintenance of the attachment. It may be added that there is no proof that the moneys raised in the business were not used to pay accruing liabilities so far as able. The indebtedness of defendant to Tuckerman is not, apparently, questioned, and, as between themselves, the mortgage is presumably valid. The fact that it has not been filed inures to the benefit of creditors, and in no sense can it be deemed a concealment of property, conceding it to be valid. At most it would be a concealment of indebtedness which would assist rather than delay creditors. In view of all the facts submitted, I fail to discover any fraudulent act on the part of defendant which warrants the continuance of this attachment.

Order of attachment vacated, with costs.

SUPREME COURT.

THE PEOPLE agt. THOMAS FITZPATRICK.

The Albany jury law — Practice as to drawing grand jurors — Code of Civil Procedure, section 1041 — Chapter 532, Laws of 1881, amending same — Person charged with crime cannot object to grand jury that they are drawn under an unconstitutional law — No way provided by Code of Criminal Procedure for such objection — Code of Criminal Procedure, section 238.

The defendant had been held to await the action of the grand jury, to convene at May term, 1883, of the Albanyoyer and terminer. Before the grand jurors were sworn in the defendant by counsel appeared and filed a paper objecting to such individuals, collectively and severally, as grand jurors, and moved to set aside and discharge the entire number because each and every one had been obtained pursuant to the provisions

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of chapter 532 of the Laws of 1881 (which was claimed to be unconstitutional and void); and not in the manner prescribed by the Revised Statutes. It was thereupon consented by both parties that the motion should stand over without prejudice to defendant's rights or to the right and duty of the court; that if an indictment should be found the objections should be considered and determined with the same force and effect as if decided prior to the organization of the grand jury. The grand jury then organized and found an indictment against defendant. About three months after an order was made in the oyer and terminer, that as to said defendant the body impaneled as a grand jury be set aside and discharged as of the date of the first presentation of the objections; that the said indictment be not received and stand as quashed; that nothing in the order was to affect the action of said grand jurors as to persons not having made such objection. On appeal from such order:

Held, first, that it was improper to quash or set aside the panel as to defendant, and yet in effect hold it good as to all other persons charged with crime who omitted to interpose objections, inasmuch as the objections raised a question of jurisdiction. If the panel was without jurisdiction as to defendant's case, it was equally without jurisdiction as to all others similarly charged.

Second. The objections urged in defendant's behalf, *i. e.*, that the grand jury was drawn from names selected under an unconstitutional law, cannot be maintained by one charged with a criminal offense, further than to see that the action or proceeding, challenged as irregular and void, was taken under the color of lawful authority; and it would not alter the case even if such action involved some proceeding of an officer or of officers taken under an unconstitutional law. The court would still retain their jurisdiction over the matter and the proceedings.

Third. An indictment found by a body drawn, summoned and sworn as a grand jury before a competent court and composed of good and lawful men fulfill this constitutional guaranty. A jury so framed is a *de facto* jury because selected and organized under the forms of law. A defect in its constitution owing to the invalidity of a law under which a panel is drawn affects no substantial right of one charged with crime, and herein an objection based thereon is not available to him.

Fourth. An indictment found by a grand jury of good and lawful men selected and drawn under color of law is a good indictment by a grand jury within the sense of the constitution, although the law under which the selection was made is void (*Reversing S. C.*, 65 *How.*, 365).

Third Department, General Term, September, 1883.

Before LEARNED, BOCKES *and* BOARDMAN, JJ.

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APPEAL from an order discharging grand jury and setting indictment aside.

The facts are fully stated in opinion.

D. Cady Herrick, for appellant.

I. The defendant could not raise the constitutional questions set forth in the paper filed by him, and stated in his objections to the grand jury, for the reason that no rights of his were involved. The manner in which the jurors were selected is something to which the defendant cannot take exception; it is something in which he has no interest. The only thing that the law guarantees him against is that an indictment shall not be found against him by his prosecutors or by the witnesses against him (*Friery* agt. *People*, 2 *Keyes*, 425; also *Cox* agt. *People*, 19 *Hun*, 430; *Carpenter* agt. *People*, 64 *N. Y.*, 483; *Pierson* agt. *People*, 79 *N. Y.*, 424-431). The manner in which the jury was selected and drawn was something in which the defendant had no interest; no rights of his were involved. * * * The defect in its constitution (the grand jury), "owing to the invalidity of the law of 1881, affected no substantial right of the defendant" (*People* agt. *Petrea*, 65 *Hun*, 59). The court will not listen to an objection made to the unconstitutionality of an act by a party whose rights it does not affect, and who, therefore, has no interest in defeating it (*Cooley's Const. Lim.*, 163). A question of constitutionality can be raised only by those injuriously affected (*Pierpont* agt. *Loveless*, 72 *N. Y.*, 211-216; *Wellington's Petition*, 16 *Pick.*, 87; *Commonwealth* agt. *Wright*, 42 *Am. R.*, 203; 3 *R. S.* (6th ed.), 1018, secs. 27, 28; *Carpenter* agt. *People*, 64 *N. Y.*, 483; *People* agt. *Harriott*, 3 *Parker*, 112).

II. The objection of the people in the court below to the consideration by the court of the paper filed, to the objections therein set forth, and the motion based thereon, as being unknown to the law and contrary to the rules provided by the Code of Criminal Procedure, should have been

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sustained. The whole proceeding in the court below, both by court and the defendant, was not only unwarranted by, but contrary to the law of the state. The proceedings that may be taken by a defendant at the organization of the grand jury are set forth in sections 237 and 239 of the Code of Criminal Procedure; and section 238 forbids a challenge to the panel or array. The objections made here constituted a challenge to the array (*People agt. Petrea*, 64 *How.* 169, *opinion by BOCKES, J.*). "The Code, by defining the causes for which the indictment may be set aside, must, by the general rule of construction, be held to exclude the entertaining of the motion for other causes than those specified (*People agt. Petrea*, 64 *How.*, 169). And again: "We think the objection to the grand jury was not one which by the new procedure the defendant could take after indictment, and as it involved no constitutional right that it was properly overruled" (*People agt. Harvey*, 1 *N. Y. Crim. R.*, 285, 286).

III. The court below, in its struggle to dispose of the grand jury, finally claims to do it under subdivision 1 of section 238 of the Code. A moment's consideration will convince anyone that that is a mere pretense to show that the Code permits such practice. The whole claim of defendant's counsel, and the argument of the learned judge to sustain his action, is that the law does not and cannot permit a grand jury to be drawn from any other source than the grand jury box. Yet here is an open confession that the Code permits, by strong implication at least, a grand jury to be drawn from some other place than the grand jury box of the county. That is the logical and necessary result of the learned justice's construction of subdivision 1 of section 238. No one does, no one can believe that that is the proper construction. It refers to the number of jurors drawn, not the place they are drawn from. The law contemplates no other place than the grand jury box. Now, the provision of the Code under which the court claimed to act is, "the court

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may, * * * discharge the panel and order another to be summoned," because; 1st. That the requisite number of ballots "was not drawn from the grand jury box of the county." This is a matter for the court entirely. It is not a matter for the defendant to raise or of which he can take advantage. "2d. It contemplates the *actual* discharge of the panel and the summoning of another in place of it." Now, the order is that as to these particular cases the grand jury be deemed set aside and discharged, but as to those cases where no objection has been filed the grand jury stands. Such a proceeding is not a discharge of the grand jury. The grand jury cannot be discharged as to one case and held as to another. As a matter of fact and of law both, the grand jury finding this indictment was never discharged. It could not be discharged in one case and not as to another. The indictment found by it was a valid indictment. The order setting it aside should be reversed, and the defendant directed to plead.

Reilly & Hamilton, for respondents.

I. The court has jurisdiction to discharge a panel before indictment, and to allow defendant's objections to the array before impanelment (*Code of Crim. Pro.*, sec. 238). The power to discharge the panel, where the requisite number of ballots was not drawn from the grand jury box of the county, is expressly conferred by this section, if exercised before indictment (*People agt. Petrea*, 1 *Cr. Rep.*, 244). The prohibition of a "challenge to the panel or array of the grand jury," does not prevent objections before impanelment. There is no grand jury *de facto* or *de jure*, until the body is sworn as such (*Code Crim. Pro.*, sec. 223; *People agt. Petrea*, *supra*), consequently, before that event, there is no panel of the grand jury, challenge to which is alone prohibited, but only the panel for a grand jury, and which may or may never become such jury. This section certainly admits of such construction, and it should be adopted, or else the right of the

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prisoner to be proceeded against, conformably to the constitution and laws of the state, would be made practically unavailable to him (*Bishop's Cr. Pro.*, sec. 113).

II. The court having such jurisdiction to discharge a panel (*I. a, sup.*), the prisoner established that the requisite number of ballots was not drawn from the grand jury box of the county. The grand jury box of the Revised Statutes was a separate box, used solely for the 300 names returned by the supervisors, and the use of the petit jury box was not a compliance, but was radically different (*People agt. Petrea, supra*, p. 237). The ballots of the Revised Statutes should be prepared from a list certified by the clerk of the supervisors, and filed with the county clerk. This list should be made up by the supervisors, exercising their judgment from personal knowledge, and limited to 300 names. Such a box and such ballots not being used, as is conceded, the requirements of the Revised Statutes and Code were not complied with, and the court was called on to exercise its discretion under section 238.

III. Jurisdiction to allow objections to the array before impanelment existing (*I. b, supra*), the facts presented sufficient objections to warrant its exercise. Should the court not consider the point sustained, that the requisite number of ballots were not drawn, the fact still remains that the proceedings up to this point had all been illegal, and performed under pretended authority of an act prohibited by the constitution, and materially denying the rights of the prisoner, to wit, to be proceeded against according to the forms of law, and to be protected by the superior personal knowledge of the supervisors in preparing their lists (1 *Bish. Cr. Pr.*, sec. 89).

IV. The *discretionary* power of the court to discharge the panel under section 238, was properly exercised, and should not be interfered with.

V. That a *de facto* grand jury may exist, though selected and drawn under an unconstitutional enactment, does not assail the order appealed from. The *People agt. Petrea*

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did not assume to decide upon rights prior to indictment, or under section 238, but settled these propositions and no more : That the act of 1881 was unconstitutional. That the right to a jury, *selected and drawn* pursuant to the Revised Statutes, was not a constitutional, but only a statutory right, and for its violation no appeal on objection after indictment was given. That for the violation of a statutory right an appeal to lie must be given by statute ; but, for the violation of a constitutional right an appeal would lie, though no statutory provision was made. That a panel summoned pursuant to an act *afterwards* declared unconstitutional, sworn in and recognized by the court, and possessing the qualifications and exercising the powers and duties of a grand jury, become such *de facto*, and its acts as such valid. The recognition by the court being essential to make a jury summoned as this was a *de facto* jury (see, also, *People agt. Lambert*, 76 *N. Y.*, 237-S), and this having no such recognition, it was neither *de facto* nor *de jure*. Never having become a grand jury, there could be no indictment, as, in fact, none appears by the record, and there is no question before this court.

BOARDMAN, J. — The defendant had been held to await the action of the grand jury, to convene at May term, 1883, of the Albany oyer and terminer. Before the grand jurors were sworn in the defendant by counsel appeared and filed a paper containing certain objections to the grand jury and prayed the court to discharge them. The district attorney opposed this application. It was thereupon consented by both parties that the motion should stand over without prejudice to defendant's rights, or to the right and duty of the court, that if an indictment should be found the objections should be considered and determined with the same force and effect as if decided prior to the organization of the grand jury. The grand jury then organized found an indictment against the defendant. About three months thereafter an order was made in said oyer and terminer that as to said defendant the body impaneled as a

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grand jury be set aside and discharged as of the date of the first presentation of the objections; that the said indictment be not received and stand as quashed; that such order was to take effect as of May seventh; that nothing therein was to affect the action of said grand jurors as to persons not having made such objections. From this order the people appeal, and counsel on each side desire that the case may be considered and disposed of on the main question rather than upon any technical ground which does not dispose of the merits.

In the first place there is an obvious inconsistency in the order. A grand jury cannot be discharged as to some of the persons indicted and remain as to the others. If discharged as to some it must be discharged as to all, otherwise there would or might be two grand juries at the same time, because the section which provides for discharging a grand jury requires the summoning of another (*Code of Crim. Pro.*, 238).

Again it is obvious that when a body of men have been sworn and impaneled as a grand jury, and as such have found indictments, they may be discharged as having finished their labors. But they cannot be discharged retroactively, as is attempted in this order, so that the order shall take effect as of a date prior to their action as a grand jury. Undoubtedly the indictments found by them may, for good cause, be quashed. But that is a very different matter. No order of the court taken subsequent to the finding of the indictment, can alter the fact that a body of men, summoned as a grand jury, were not discharged, but acted as such and found the indictment.

But counsel on both sides express the wish that this appeal should be considered as if the order had, in fact, been made on the seventh of May. And therefore we pass over the inconsistencies above mentioned. Still they seem to have occurred to the learned justice, because the order not only discharges the grand jury *nunc pro tunc*, which could not have been done, but it also quashes or sets aside the indictment.

And thus we have the further difficulty that an order which

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is to take effect May seventh, quashes or sets aside an indictment which had not then been found ; that is, it quashes it in advance.

The learned justice well expresses in his opinion, the doubt as to what the order should be. Let us next inquire whether the order was proper so far as it quashed the indictment. The objections raised are precisely those urged in the *Petrea case* (64 *How.*, 139 ; 65 *How.*, 59). It was in that case held by the court of appeals affirming the decision of this court and of the court of sessions, that where an indictment had been found by a grand jury drawn under this very law and in the very manner now in question, it should not be quashed on the defendant's motion.

It cannot be necessary or proper to argue that question again. Whatever else may have been said in the opinion of the court of appeals, that principle was absolutely decided, and such decision should govern. The oyer and terminer then should not in this case have quashed the indictment.

We think the learned justice must have seen that his decision in this respect was contrary to the law of the *Petrea case*, for a large part of his opinion is made up of citations of authorities, principally from other states, tending to show that the decision of the court of appeals is wrong, and that an indictment found by a grand jury selected under an unconstitutional law should be quashed on the defendant's motion. It is suggested, however, that although an indictment after it is found ought not to be quashed upon the grounds urged in the *Petrea case*, yet if these grounds were presented to the court before the indictment was found, as a reason for quashing it after it should be found, then the decision in the *Petrea case* would not apply and the indictment should be quashed. But this cannot be. That decision held that no constitutional right of the defendant was invaded by holding him to answer under the indictment, although the same facts appear there as here. An indictment cannot be quashed before it is found. After it is found the facts now alleged present no reason for

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quashing it, as was decided in the *Petrea* case. Hence the same facts can never be a ground for quashing an indictment, because until an indictment shall be found a motion to quash cannot be made. But again, this order discharges the grand jury or the body so called, and by agreement of counsel we are to consider the order as if it had been made May seventh.

The first objection to this part of the order which is obvious is that just stated, viz., that on a motion by a person held to trial the court assumed to discharge the grand jury as to him, and allow it to stand as to others. How could such an order be properly made at the opening of the court, or at any other time? Would the court, on the seventh of May, have summoned another especially for this defendant? Would the court have charged the one grand jury to inquire as to all crimes except those of Thomas Fitzpatrick, and the other to inquire as to his only? It is plain that even when we treat this order as one made at the opening of the court it is inconsistent with itself.

Again, there are more serious objections. This paper filed by the defendant, call it by any name he may please, is really in effect a challenge to the array. This is a well known term which calls for no definition. Similar objections were defined to be a challenge in the *Petrea* case (64 *How.*, 139; 65 *How.*, 59.)

Now, the Code of Criminal Procedure (*sec.* 238) forbids any challenge to the panel or to the array of a grand jury. The counsel for the defendant urges that this section does not prevent objections made before the grand jury is impaneled. But a challenge is an objection made to the swearing in and impanneling of the grand jury, not an objection made after they are sworn in and impaneled. Such had been the ordinary meaning of the word, and in that sense the legislature must have used it when it forbade challenges to the panel or array. It would be trifling to enact a section which meant that challenges to the panel or array could not be made after a grand jury was sworn in and impaneled but might be made before.

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The learned justice, however, takes another view and thinks that the challenges to the panel or array, which are forbidden by this section, are challenges to a legal panel or array of grand jurors and not challenges to an illegal panel. One would suppose there was not much necessity to prohibit challenges to the panel or array of a legal grand jury. The section means just what it says, that is, that challenges or objections to the panel or array of the grand jury can no longer be taken. It was evidently thought that as the grand jury was only an accusing body, it was unnecessary to give an accused person the right to make objections to the details of its selection. If the Code had not forbidden challenges of this kind, still under the decision of the Petrea case, we do not see how this could be allowed. If the law in question was unconstitutional this could not be asserted by a party whose rights it did not effect (*Cooley Const. Lim.*, 163; *People agt. B. F. and C. I. R. R. Co.*, per FINCH, J., MS.; *Pierpoint agt. Loveless*, 72 N. Y., 211). And the decision in the Petrea case was that the defendant's constitutional rights were not invaded by holding him to answer the indictment, and, therefore, not invaded by the mode of selecting the grand jury (*Piercy agt. The People*, 2 Keyes, 425).

The learned judge, however, places this order on another ground. Section 238 above cited, after forbidding, provides that the court may, in its discretion, discharge the grand jury and order a new one to be summoned for any of several causes, among them, "that the requisite number of ballots was not drawn from the grand jury box of the county." We can hardly understand how the order appealed from could have been made in the exercise of that discretion, because the learned justice says in his opinion, that "whenever it plainly appears that every safeguard of law in the selection of grand jurors has been disregarded," etc. Now then, "that it is by the enactment of the very excellent chapter 532, Laws of 1881," then it was a wise exercise of discretion to set aside the supposed panel and to order a new panel to be summoned. Now if this were so, the same wise discretion would seem to

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require that other indicted persons should be protected as well as this defendant. And it would seem an unwise exercise of discretion to grant as a special favor to this defendant the safeguard to which others were equally entitled. Yet the order in the discretion, withholds from those who have not made the objections "the guaranties which the constitution gives to every citizen for his protection.

It may be remarked in passing that while in the opinion of the court of appeals in the Petrea case the act in question was spoken of as unconstitutional, yet it was distinctly held that the question of constitutionality could not be raised by the defendant in that case. As it could not be raised by him it could not in that case be decided by the court. As is said by judge FINCH, in *People agt. Brooklyn, Flushing and Coney Island Railroad* (MS. opinion): "It is our duty to decide a constitutional question only when it is directly and necessarily involved in the issue to be determined." Whatever was said as to the unconstitutionality of the law was *obiter*, that it is, was not involved in the decisions, and only served to encourage further efforts to thwart the criminal law.

Was then the discretion proper which was thus exercised by the court of oyer and terminer in favor of Fitzpatrick and refused as to other accused persons?

The court of appeals had held that such a grand jury was competent to find valid indictments. Why then should the court of oyer and terminer set aside this competent jury? The requisite number of ballots had been drawn. These ballots had been drawn from the only box and list of jurors made up in the county from which to draw grand jurors.

This box and list were, in fact, the grand jury box and list. It was plainly immaterial what the box was called. It held in fact the names selected under color of law as grand jurors. And there was no other box or list from which grand jurors could be drawn. This box and list were to such extent the box and list from which to draw grand jurors and it had been held by the court of appeals that

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a grand jury drawn therefrom was a valid grand jury. For what possible reason or under what discretion then should a grand jury so drawn be set aside? Not the least objection was made to the competency or qualifications of any or all of them.

If the learned justice had refused to set the jury aside, the indictments found by them would have been valid and the administration of the criminal law would not have been obstructed by an objection without any real merit. We think it was not a wise exercise of discretion to set aside a body of unexceptionable men, whose competency to find indictments had been established by the court of appeals.

It seems to us the error which underlies nearly all of the reasoning of the learned justice in his opinion is that he assumes that any man may set up the unconstitutionality of a law although it does not affect his rights or subject him to any wrong. This is carried a step farther in assuming that it is a wise discretion to set aside a body of competent officers against the mode of selection, of whom even, if it be illegal, no one has the right to set aside any objection.

No objection is made by the defendant to the right of the people to appeal from the order and so that subject is not considered.

The order appealed from should be reversed.

LEARNED, P. J., and BOCKES, J., concur.

BOCKES, J. — I think the order should be reversed. It was, as I think, improper to quash or set aside the panel as to Fitzpatrick, yet in effect to hold it good as to all other persons charged with crime who omitted to interpose objections, inasmuch as the objections raised a question of jurisdiction. If the panel was without jurisdiction as to Fitzpatrick's case, it was equally without jurisdiction as to all others similarly charged. But we are asked to consider the case on the merits, just as it was examined in the court of oyer and terminer, to raise the validity of the objection urged against the panel by

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Fitzpatrick as regards the mode of drawing, summoning and impanneling the grand jury. This question, I think, is settled against Fitzpatrick by this court, and by the court of appeals in the Petrea case. It was held in that case that the objections here urged in Fitzpatrick's behalf could not be maintained by one charged with a criminal offense, further than to see that the action or proceeding challenged as irregular and void was taken *under the color of lawful authority*; and, as was said in the case cited, it would not alter the case even if such action involved some proceeding of an officer or of officers taken under an unconstitutional law. The court would still retain this jurisdiction over the matter and the proceedings. The authorities upholding this conclusion are cited in Petrea's case as well in this court as in the court of appeals. It was said in the latter court, in answer to the objections here urged, that an indictment found by a body drawn, summoned and sworn as a grand jury *before a competent court*, and composed of good and lawful men, fulfil the constitutional guaranty; that a jury so formed was a *de facto* jury, because selected and organized under the forms of law. That a defect in its constitution owing to the invalidity of a law under which a panel was drawn, affected no substantial right of one charged with crime, hence an objection based thereon was not available to him. So it was held "that an indictment found by a grand jury of good and lawful men, selected and drawn under *color of law*, was a good indictment by a grand jury within the sense of the constitution, although the law under which the selection was made was void, it would seem to follow that if an indictment when found would be good and valid, it could hardly be maintained that the grand jury which found it acted without jurisdiction or authority in the premises. I am of the opinion that the decision in the Petrea case determines all questions presented on this appeal against the objections urged in the oyer in Fitzpatrick's behalf.

It follows that the order appealed from should be reversed.

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SUPREME COURT.

JOHN W. STEBBINS, respondent, agt. DWIGHT B. COWLES,
appellant.

Reference — Action by an attorney for services — Defense, payment; and that the services were performed negligently — When referable — Appeal — When discretionary orders not reviewable.

In an action brought by an attorney for services, the complaint contained a single count alleging such services generally, and the bill of particulars furnished by plaintiff specified numerous items extending through a period of four years; the answer admitted generally that the plaintiff performed services for defendant "during the term and as stated in the complaint," but with that exception denied the complaint and alleged payment, and that the services were performed negligently. The plaintiff having moved for a reference, the defendant admitted that the items of plaintiff's bill of particulars were correctly stated as to their number and date and character of service, but not as to their value:

Held, that all the items of the account, their nature and value must be proved, and the trial would involve the examination of a long account and was referable.

Held, also, that the action was one which the county court had power to refer in its discretion, and the order being discretionary the supreme court cannot review it on appeal.

The decision of one tribunal resting in discretion are not reviewable by another. This rule does not apply to a review by the general term of this court of the decisions of the special term, they being parts of the same court. But the county court being an independent tribunal, this court cannot interfere with the exercise of its discretionary powers.

Fourth Department, General Term, October, 1883.

Before SMITH, P. J., HARDIN and BARKER, JJ.

APPEAL from an order of the the Monroe county court deciding that the action be referred for trial.

W. Henry Davis, for appellant.

I. On the 2d day of October, 1882, the Monroe county court denied plaintiff's motion for a reference herein. It was therefore error to arbitrarily and against defendant's

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objection to take this case from the jury and send it to a referee. If there was a long account upon the part of plaintiff, the admissions of defendant, as incorporated in the order, obviated any such objection. If the court had the power to take the case from the jury with the order of October second still in full force and operation, the only way it could have done so would have been by withdrawing a juror. This was not done. The whole of plaintiff's account is in fact but one item, for defendant admits the account as stated, but alleges the services were worthless, unskillful, etc. It was error for the court to decide that all the items of account, their nature and value must be proved. Under the order it was only necessary to prove their value in gross.

II. The answer alleges unskillful and fraudulent conduct of plaintiff. As to the unskillful part, the allegation is pretty well sustained by his own showing upon the trial of this case. It was error for the court to decide that no difficult questions of law would arise upon the trial. The pleadings show otherwise, and nothing was developed upon the trial to justify such a conclusion. There was only \$367 in controversy in all the suits and business with which plaintiff had to do. Defendant has paid him \$495, and he now seeks \$425 more. This is unmeasured and exorbitant pay, and all the issues raised by the pleadings should be submitted to a jury.

III. The action should not have been referred (*Martin* agt. *The Windsor Hotel Co.*, 10 *Hun*, 304; *Felt* agt. *Tiffany*, 11 *Hun*, 62; *Bathgate* agt. *Haskin*, 39 *N. Y.* 533; *Brink* agt. *Republic Fire Ins. Co.*, 2 *N. Y. S. C. (T. & C.)*, 550; *Thomas* agt. *Neat*, 6 *Wend.*, 503; *Dickinson* agt. *Mitchell*, 10 *Abb.*, 286; *Dittenhoeffer* agt. *Lewis*, 5 *Daly*, 72; *Warning* agt. *Chamberlain*, 14 *N. Y. Weekly Dig.*, 564). Prior to the constitution of 1846, a compulsory reference of the case *sub judice* could not have been ordered. By section 2 of article 1 of that instrument, it is provided that "the trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." No power has existed since that time

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whereby this right could in any wise be interfered with without the consent of the parties. This, in the language of the court, is the "paramount law upon the subject," and which courts of justice are ever vigilant to guard and maintain.

The order of reference should be reversed.

John W. Stebbins, respondent in person.

SMITH, *P. J.* — The action is brought to recover for services as an attorney and counselor at law. The complaint contains a single count alleging such services generally, and the bill of particulars furnished by the plaintiff specifies numerous items, extending through a period of four years, including services rendered in four separate suits. The answer admitted generally that the plaintiff performed services for defendant "during the time and as stated in the complaint," but with that exception denied the complaint and alleged payment, and that the services were performed negligently.

The plaintiff having moved for a reference, the defendant admitted that the items of plaintiff's bill of particulars were correctly stated as to their number and date and character of service, but not as to their value, and therefore the motion was denied. Subsequently the cause came on for trial before the county court, and the plaintiff having proceeded in part with his proof and offered evidence as to value which was objected to by the defendant, the court decided that all the items of the account, their nature and value must be proved, and ordered a reference. From that order this appeal is taken.

We think the appeal cannot be maintained. The action was one which the county court had power to refer in its discretion. The numerous items of the account were not so fully and distinctly admitted as to preclude the necessity of giving evidence of their nature as well as their value, as seems to have been demonstrated by the partial trial of the cause. The facts warranted the conclusion of the court below, that

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the trial involved the examination of a long account. The order being discretionary we cannot review it.

The decisions of one tribunal resting in discretion, are not reviewable by another (*Ward* agt. *Wiles*, 24 *N. Y.*, 635; *Tanner* agt. *Marsh*, 53 *Barb.*, 438). That rule does not apply to a review by the general term of this court, of the decision of the special term, they being parts of the same court. But the county court being an independent tribunal, this court cannot interfere with the exercise of its discretionary powers.

The learned counsel for the appellant cites cases in which a reference of an attorney's account has been refused. No case has gone so far as to deny the power to refer in such a case; they all rest upon circumstances of discretion (*Martin* agt. *The Windsor Hotel Company*, 10 *Hun*, 304), or upon the ground that the action did not involve a long account (*Felt* agt. *Tiffany*, 11 *id.*, 62).

The appeal should be dismissed, with ten dollars costs and disbursements.

HARDIN and BARKER, JJ., concurred.

So ordered.

SUPREME COURT.

BOLTON HALL *et al.* agt. THE UNITED STATE REFLECTOR COMPANY.

Attachment—Sheriff's fees—On vacation of an attachment sheriff not required to deliver attached property till his fees are paid—When order directing plaintiffs to pay sheriff's fees on vacation of an attachment will not be enforced by precept for contempt—Power of court to determine who shall pay sheriff's charges—Code of Civil Procedure, sections 14, 15, 709, 1241–3256.

Where an attachment is vacated, the sheriff will not be required to deliver the attached property to the defendant until his costs, charges and expenses are paid.

Where, in an order vacating an attachment, the plaintiff is directed to

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pay the sheriff's fees, such payment will not be enforced by precept against the person as for contempt.

Whether the court can, upon motion, determine which of the parties shall pay the sheriff's charges, *quære*.

New York Chambers, October, 1883.

PLAINTIFFS, upon commencing this action, obtained a warrant of attachment, under which the sheriff of New York county attached a large stock of gas fixtures, machinery, &c. After long litigation, the attachment was vacated, the same order taxing the sheriff's fees and directing that the same be paid by plaintiffs. The sheriff's fees not being paid by either party, the sheriff refused to deliver the attached property to the defendant or its assignee. Defendant moved for an order requiring the sheriff to deliver the attached property without payment of his charges, and also for a precept against the persons of the plaintiffs to punish them as for contempt in failing to pay the sheriff's charges, as directed by the order.

Subsequent to the vacation of the attachment, defendant's assignee commenced an action against the sheriff as for a conversion in refusing to deliver the attached property, and the sheriff commenced an action against plaintiffs, defendant and the assignee, to procure a judgment of sale of the property in satisfaction of his charges.

Edward P. Wilder, for defendant and motion.

Chamberlain, Carter & Hornblower, for plaintiffs.

Charles F. McLean, for sheriff.

POTTER, *J.* — There are two motions made by the defendant in this action; one to punish plaintiffs for contempt by arrest and imprisonment, under an attachment, for failure to pay the fees and charges of the sheriff, as fixed and allowed by the order of this court, June 1, 1883, upon an attachment issued in this action; and the other to direct the sheriff to

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surrender and deliver the property of the defendant taken by the sheriff under said attachment.

I have come to the conclusion that both motions should be denied. The law gives the sheriff certain specified fees for serving an attachment, and also provides that the judge issuing the attachment shall allow the sheriff additional compensation for his services and trouble in taking possession of and preserving the property. The fees and charges are to be included in the judgment in favor of the party to whom costs in the action are awarded (*Code of Civil Pro.*, sec. 3256), and collected as part of the costs in the action. If the attachment remains in force throughout the action, the sheriff will sell the property, either under the attachment or execution, and retain his fees and charges out of the proceeds of the sale.

If the warrant of attachment is vacated or annulled, or discharged, the sheriff is required to deliver the property to the defendant or the person entitled thereto, upon reasonable demand and upon payment of all costs and charges and expenses legally chargeable by the sheriff (*Code of Civil Pro.*, sec. 709). The fees and charges thus paid by the defendant will be included in a judgment for costs in the action, if he be awarded costs of the action, and be collected of the plaintiffs upon the execution against the plaintiffs, or by an action upon the undertaking given by plaintiffs upon issuing the attachment; and likewise out of the undertaking if the defendant pays the sheriff's fees, under section 709, in case the defendant is not awarded costs of the action.

It seems to me that this is the scheme provided by the Code for the payment of the sheriff's fees and charges upon an attachment, and for the reimbursement of the party paying them. This scheme protects the sheriff in any event of the action, or of the warrant of attachment, and is the only one that will suffice for that purpose; and is an amendment and improvement of the former statutes for that reason. But if this view is not correct, I should not be disposed to grant

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an order directing the sheriff to deliver the property attached to the defendant or his vendee, for the reason that an action has been commenced by him and is still pending, to recover the value of this property of the sheriff, as for a conversion of it by the latter, in refusing to deliver it until his fees and charges were paid.

The defendant or his vendee has elected that mode of testing the right of the sheriff to retain the property until his fees and charges are paid, and I think it was the best and wisest way of determining that question and am not disposed to interfere with the mode selected by him. This motion should therefore be denied, with costs.

In regard to the motion to punish the plaintiffs for contempt in not paying the costs ordered to be paid by plaintiffs to the defendant under the order of June 1, 1883, I think there is too much doubt in relation to the law to warrant or justify me in signing an order to arrest and imprison the plaintiffs. It is a harsh and severe remedy and should not be resorted to or applied, except in a clear case. Sections 14 and 15, subdivisions 3 and 1241 of the Code of Civil Procedure, upon the subject of contempts and arrests for the non-payment of money, leave the question of the right to issue a precept against the body in this case too uncertain to warrant or justify such process.

But there is another source of doubt in this case. I am not satisfied that the court had the power to make the order for non-compliance with which the party is sought to be put in contempt. It was competent for the judge issuing the attachment to fix and allow the fees and charges of the sheriff upon the attachment, under section 3307. I am not satisfied that the court has the power to fix those fees and charges, or that the court has the power to determine who shall pay those fees and charges, upon motion or by an order or otherwise than as prescribed by the scheme of the Code as above outlined.

But another and sufficient reason for denying this motion

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is to be found in the fact that the sheriff has commenced an action, which is now pending, against the plaintiffs and defendant, and the defendant's vendee, to determine the questions involved in both motions as to the liability of the parties or either of them to pay his fees and charges, and in what proportion and to what extent, and whether he has a right to retain the attached property until such fees and charges are paid. These questions can be much more satisfactorily determined by an action than by these motions. In an action, all parties can be heard and all questions presented at the same time, and one judgment rendered, embracing all the questions in dispute between the various parties. I therefore deny the motion to punish for contempt, but without costs, as the action of the defendant was based upon an order of the court.

CITY COURT OF BROOKLYN.

CHARLES DITBERNER agt. STEPHEN ROGERS.

Negligence — Liability of employers for injuries received by employe — When contractor not liable for injuries received by breaking of a plank upon a scaffold.

One who licenses or employs others to go on a lofty scaffold is not liable for injuries from the breaking of a plank unless affirmative knowledge of its defects is brought home to him.

The rule in this state is not that laid down in the recent English cases (*Heaven* agt. *Pender*; 28 *Alb. L. J.*, 143, &c.).

Men loaned by a contractor to a sub-contractor to move planks, &c., as required by the sub-contractor, will not be held to be the contractor's men in such sense as to make the contractor liable.

General Term, November, 1883.

THE plaintiff sues for \$15,000 damages sustained in falling some sixty feet from a lofty scaffold. The church furnished the original scaffold to all the several contractors. Plaintiff

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was in the employ of one Mulholland, a sub-contractor, who frescoed the interior of the dome of the church. Rogers had the contract of painting and made a sub-contract for frescoing to Mulholland. Rogers loaned two men to Mulholland to move the planks as required. A cross-grained plank broke in the middle and precipitated plaintiff to the floor. These two men (as plaintiff's testimony showed) placed all the planks in that quarter of the church, and plaintiff claimed they should have detected and rejected the cross-grained plank. The frescoing which defendant employed Mulholland to do was necessarily to be done on the scaffold in question.

A. Simis, for plaintiff. The jury should have passed on the question whether defendant did contract to furnish the scaffold, or else whether he did not in fact, by his men, place these planks. Defendant was negligent in not testing the planks and scaffold before sending his sub-contractor upon it. The negligence of defendant's servants was the negligence of defendant. Nevertheless, negligence of defendant was not necessary. All who license, permit or employ people to go upon or make use of articles pre-eminently dangerous, *per se* (such as lofty scaffolds, noxious poisons, &c.), are liable for consequent injuries. So held in New York and in a recent case like that at bar in England (*Heaven* agt. *Pender*, 28 *Alb. L. J.*, 143; *Coughtry* agt. *Globe W. Co.*, 56 *N. Y.*, 124; *Thomas* agt. *Winchester*, 6 *N. Y.*, 397; *Homer* agt. *Nicholson*, 56 *Mo.*, 220; *Michaels* agt. *Stanton*, 3 *Hun*, 462; *Laning* agt. *N. Y. C. R. R.*, 49 *N. Y.*, 525).

W. G. Peckham, for defendant. The nonsuit should be affirmed. *Heaven* agt. *Pender* is not law in this state. Privity of contract or liability is not requisite as to certain matters dangerous *per se*, such as lofty scaffolds; but some affirmative negligence or notice is requisite in this state. The two men were: 1st. Competent men. 2d. They were, *pro tempore*, Mulholland's men. That the foreman and his assist-

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ant were, neither of them, an *alter ergo* of defendant, was a matter of law for the court (*Hart* agt. *N. Y. Floating Dock*, 48 *Super. Ct.*, 466; *Henry* agt. *Brady*, 9 *Daly*, 43; *Devlin* agt. *Smith*, 89 *N. Y.*, 470, and 25 *Hun*, 207; *McMillin* agt. *S. R. R.*, 20 *Barb.*, 454).

McCUE, *J.* — The defendant who is a painter entered into a contract for the painting and frescoing of a church which was being built. The building committee of the church made contracts for the different kinds of work necessary in the erection of the structure, and among others made the contract with the defendant. Upon the trial the defendant testified: "The church were to furnish me with the scaffold, they did so; furnished the entire scaffold; I had nothing at all to do with it; I did not furnish or lay, or order to be laid, any planks in the whole scaffold." The scaffold was erected in September, 1882, and was used by the framers, iron men, lathers, plasterers, carpenters and finally by the defendant who commenced work, viz., the plain painting on the 14th day of November, 1882. About the 1st day of December, 1882, the defendant employed one Mulholland, under a sub-contract to do the fresco work, and Mulholland employed the plaintiff to aid with another in the fresco work, while so engaged on the sixteenth day of December, the plaintiff fell from the the scaffold and was injured. Mulholland obtained from the defendant the services of two workmen, who had been engaged under the direction of the defendant in doing the plain work of the painting. Mulholland testified: "I am a fresco painter and am in the habit of taking sub-contracts which I did in the case of this church; as to the ornamental part of the frescoing, Mr. Rogers (the defendant) had no control or direction of my men. It was not a portion of my contract that he should furnish me two men, but I requested the loan of these men in connection with the contract. He had to furnish me with a scaffold, and he furnished me with two men who had some knowledge of scaffolding, or I would

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not have taken them; I knew them to be competent. Mr. Rogers never, to my knowledge, gave any orders or directions for the placing or replacing, or removing or setting of the planks." It also appears that these two men, George and Henry, so furnished by the defendant, were also paid by him, but they were under the direction of Mulholland, and it was their business under his directions to move the planks from one section to another of the scaffold for the fresco painters to do their work. "The fresco painter needs more scaffold than the plasterer does, and to make the scaffold good and secure and comfortable, planks had to be taken away from the other sections and moved around there."

At the close of the plaintiff's case a motion for a nonsuit was granted, the exceptions to be heard in the first instance at the general term.

The facts thus referred to are sufficient to present the questions upon which it is claimed that the defendant is liable for the accident, and that the plaintiff had the right to go to the jury on the questions of negligence.

The plaintiff claims: 1st. That the defendant was bound to provide a safe scaffold for Mulholland's men, and that he did not. 2d. That the broken plank was placed there by the defendant's employes, and that it was negligence to supply the scaffold in that condition for Mulholland.

We must bear in mind that the gist of the action is negligence. "An employer does not undertake absolutely with his employes for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care in that respect, and when injury from an employe results from a defect in the implements furnished, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it." Such is the rule laid down in the case of *Derlin* agt. *Smith* (89 N. Y., 476). Upon the undisputed facts of the case and under this rule, it seems to us that the case under examination was properly disposed of.

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The scaffold in use was not constructed by the defendant. It was constructed by the building committee of the church, and was used in common by all the workmen employed on the different parts of the general structure. But besides the scaffold proper (leaving out the planks) was sufficiently and securely built. It had been used continuously from its erection with entire safety, and there had been no suggestion even that the scaffold was unsafe, or that its condition caused the accident. Undoubtedly it was the breaking of a loose plank which precipitated the plaintiff.

If it had appeared that the scaffold proper had been insufficiently secured or fastened, as in the case of *Devlin agt. Smith*, there might have been a question to submit to the jury as to the negligence of the defendant in furnishing a defective implement or structure, but such is not the fact, and upon this branch of the case we think the ruling of the court at trial term was clear and correct.

The other question then remains, was the use of the broken plank any evidence of the neglect of the defendant? We think not. There is no evidence going to show that the condition of the plank was observed by any of the workmen, and, within the rule above stated, knowledge of the defect should have been brought to the defendant. There is no evidence going to show that this particular plank was furnished by the defendant.

If it should be said that the two workmen who were furnished by the defendant to the sub-contractor, laid and changed from time to time, as it became necessary, all the planks, including this particular one which caused the accident, to make a flooring for the fresco painters to work, it cannot be claimed that they were in the defendant's employ. The evidence is clear that while their wages were advanced by the defendant, according to the terms of the sub-contract between the defendant and Mulholland, nevertheless, on this day and while doing this work, George and Henry, the two workmen referred to, were under

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the direction of Mulholland, and were his workmen as much as was the plaintiff himself. If they, or either of them, then, were careless or negligent, the result cannot be charged to the defendant. It may be regarded as an instance of carelessness on the part of a fellow workman, but does not involve the liability of the defendant as an employer.

Without, therefore, discussing this branch of the case any further, we are of the opinion that, on all the evidence in the case, there is no cause of action and the nonsuit below should be affirmed and judgment entered in favor of the defendant against the plaintiffs, with costs.

REYNOLDS, J. — I concur in the judgment for the defendant. Plaintiff was not in his employ, nor was there any privity of contract between them. Neither is the defendant liable upon the doctrine of *Deelin* agt. *Smith*. He did not build the scaffold, nor furnish any of the materials used in it or upon it. The church furnished the scaffold to him (and to the other mechanics) to do his work. A part of this work he sub-contracted to Mulholland, the plaintiff's employer, and it was tacitly taken for granted between them that Mulholland should use the same scaffold which had been furnished to defendant. He says "he had to furnish me with a scaffold," and this is explained on his cross-examination as follows: "Q. You say Rogers had to supply you with a scaffold? A. Some one had to supply me; I never supply scaffolds." It does not appear from this or any other testimony in the case that defendant agreed with Mulholland to furnish him a scaffold. It was simply assumed that he was to use the one that was there. This does not make the defendant responsible for its soundness.

I also agree with the chief judge that defendant is not responsible for the acts of the two men whom he had lent to Mulholland to work for him. But whether he was or not I

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see no evidence that either of them was guilty of negligence in the matter.

Nonsuit affirmed.

Motion was made for a reargument on the basis of *Heaven* agt. *Pender, &c.* (decided since the appeal). The motion was denied.

SUPREME COURT.

PETER BOWE agt. THE UNITED STATES REFLECTOR
COMPANY *et al.*

Sheriff's lien for costs in attachment suits—How enforced—Code of Civil Procedure, section 709.

A sheriff has a lien for his costs, charges and expenses upon property remaining in his hands after vacation of the attachment under which he seized the same, and he may sustain an action to enforce the same by a sale of the property (*Ill!* agt. *U. S. Reflector Co.*, *ante*, 31, *approved*).

Special Term, October, 1883.

In May, 1881, Hall, Nicoll & Granberry commenced an action in the supreme court against the United States Reflector Company, at the same time obtaining an attachment under which the plaintiff, then sheriff of the city and county of New York, attached a large stock of gas fixtures, machinery, &c. In May, 1883, the attachment was vacated and the sheriff's fees taxed thereon. The sheriff refused to deliver the property to the defendant or its assignee until his charges were paid; and, neither party paying them, he brought suit against both parties to the original action and the defendant's assignee, alleging a lien upon the property for his costs, charges and expenses, and praying a sale in satisfaction thereof, and judgment for any deficiency.

The reflector company demurred to the complaint upon the grounds that the complaint did not state facts sufficient

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to constitute a cause of action, that there was a misjoinder of parties and a misjoinder of causes of action.

Defendant Corbit, the reflector company's assignee, also demurred upon the first ground.

Malcolm Graham, for plaintiff.

Edward P. Wilder, for defendant United States Reflector Company.

William Arrowsmith, for defendant Corbit.

VAN VORST, *J.* — There must be judgment for the plaintiff on the demurrer. Section 709 of the Code of Civil Procedure recognizes the sheriff's right to his costs and fees, notwithstanding the attachment has been set aside; and until paid, he is not obliged to deliver the property to the defendant. This amounts to a lien in his favor upon the goods attached for the amount of his fees. The action is therefore proper to enforce his lien by a sale of property, for otherwise the expense of detaining it, together with his fees, would exceed the value of the property.

Justice POTTER has had the subject lately under consideration in a controversy between these parties, and by his opinion, a copy of which has been handed up, he expresses the views substantially above mentioned.

There must be judgment for the plaintiff on the demurrer, with liberty to defendants to answer on payment of costs.

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SUPREME COURT.

In the Matter of the SARATOGA AND SCHENECTADY RAILROAD COMPANY agt. THE SCHENECTADY STOVE COMPANY and others.

Railroads — Condemnation of land for railroad purposes — Court no power to order a deposit of the sum awarded pending an appeal.

When there is no dispute as to the parties entitled to receive the compensation awarded by a commission for property sought to be taken, nor disability to receive it, the court has no power to order a deposit of the sum awarded, or any part thereof, during an appeal to be taken by the railroad company from such appraisal.

Albany Special Term, August, 1883.

MOTION to confirm report of commissioners in proceedings to acquire title to lands needed for railroad purposes.

Edwin Young and Henry Smith, for railroad company.

S. W. Jackson, for landowners.

WESTBROOK, J. — The commissioners appointed by the court to appraise the property needed by the Saratoga and Schenectady Railroad Company have, by their report now presented for confirmation, found the value of the property sought to be taken to be \$43,672.50. They further find that the Schenectady Stove Company is the owner in fee of such property, subject only to two mortgages held and owned by the executors of the last will and testament of Lyman Sanford, deceased, the amount due upon which the report specifies.

The Railway Company, being dissatisfied with the appraisal and being about to appeal therefrom, asks that a portion of the award, in and by the order confirming it, be directed to be deposited in some designated depository pending the appeal. To this the owner of the property objects, and insists,

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that as there is no dispute as to the persons entitled to receive the money, nor any disability on the part of either to receive it, no order for confirmation of the report should be made containing a provision which shall prevent such persons, or any of them, from immediately obtaining the sum awarded.

The question thus presented is, has the court power to confirm the award of the commissioners, and to direct the deposit of the money found by the commissioners to be the value of the property sought to be acquired, or any part thereof, pending an appeal, when there is no dispute in regard to the parties, or persons entitled to receive it?

By the seventeenth section of the general railroad act (*chap. 140 of Laws of 1850*) it is provided that in the order of confirmation of the report of the commissioners, the court "shall also direct to whom the money is to be paid, or in what bank and in what manner it shall be deposited by the company."

The nineteenth section of the same act provides: "If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the company, and may determine who is entitled to the same, and direct to whom the same shall be paid; and may, in its discretion, order a reference to ascertain the facts on which such determination and order are to be made."

The eighteenth section of the act requires "a certified copy" of the order of confirmation to be "recorded at full length in the clerk's office of the county in which the land described in it is situated," and declares, "thereupon, and on the payment or deposit by the company of the money to be paid as compensation for the land, and for costs, expenses and counsel fees, as aforesaid and as directed by said order, the company shall be entitled to enter upon, take possession of, and use the said land for the purposes of its incorporation during the continuance of its corporate existence, by virtue of this or any other act; and all persons who have been made parties to the proceedings shall be divested and barred of all

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right, estate, and interest in such real estate during the corporate existence of the company as aforesaid."

Provision is further made in such eighteenth section for an appeal, in which the court shall have power to order a new appraisal, which, when made, "shall be final and conclusive on all the parties interested." If by such second appraisal the amount awarded shall be increased, such increase "shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited in the bank, as the court shall direct." If, however, the amount awarded by the first report shall be reduced on the new appraisal, the amount of such reduction "shall be refunded to the company by the party to whom the same may have been paid, and judgment therefor may be rendered by the court on the filing of the second report, against the party liable to pay the same."

The counsel for the railroad company contend that section 17 (quoted above) expressly confers upon the court the power to order the deposit, because it provides that the order of confirmation shall "direct to whom the money is to be paid, or in what bank, and in what manner it shall be deposited by the company." The counsel for the owners of the land, on the other hand, insists that this section shall be read in connection with section 19, and that such power to order the deposit only exists when there is a dispute as to the parties who are entitled to receive the money, and that in this case the deposit should not be directed, as there is no question whatever concerning the individuals entitled to receive the payment.

If the provisions of section 18 (also hereinbefore stated), which give to the corporation initiating the proceedings the right of occupancy of the land upon the recording of the certified copy order of confirmation, and "the payment *or deposit* by the company of the sums to be paid as compensation for the land," are considered, it will be seen that the effect of the order, if made in the form asked by the railroad company,

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will be to give and award to the railroad company the possession of the land without making compensation to the owner. This cannot be done without a violation of the constitution of the state, which expressly declares (*art. 1, sec. 7*): “*When private property shall be taken for any public use the compensation to be made therefor*, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.”

This provision assumes that the right to take the property shall only exist when a “compensation” is “made therefor” at the time of such taking, for the ascertainment of the amount of which provision is also made. This is, perhaps, made more clear by giving to the word “when” one of Webster’s definitions, which is, “at the time that,” and substituting such definition in the reading for it so as to read thus: “At the time that private property shall be taken for any public use the compensation to be made therefor * * * shall be ascertained by a jury, or by not less than three commissioners, as shall be prescribed by law.” A slight transposition of the words makes the thought still more manifest. The compensation to be made for private property at the time that it shall be taken for public use shall be ascertained, &c. This view of the constitution is not at all impaired by the concession that in cases where there is a dispute as to who is entitled to the award, the court may order a deposit of the money, and that the title given by the statute will in all such cases vest in the applicant before actual payment, for this is upon the principle, well stated by the superior court of the city of New York, through JONES, J., in *Strong agt. The New York Rubber Company* (1 Sweeny, 78, 87), “that if certain and ample provision be made by law, so that the owner can coerce payment of the compensation adjusted and awarded to him, through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay, the constitutional requirement for the making of just compensation is sufficiently satisfied.” It is

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also true, however, as the learned judge further says, that as "this is substituting means for enforcing payment in place of actual payment, before such means can operate as a substitute they must become perfected and ripened so as to vest in the owner a present right of enforcement." It is needless to argue that the order prepared by the railroad company does not give to "the owner a present right of enforcement" of payment of the sum awarded, but it would, if the order had any validity, give to the petitioner the immediate right of occupancy of the property sought to be condemned, while the owner would be pursuing the purchase-price through the tedious machinery of courts.

The Matter of the New York Central and Hudson River Railroad Company (60 N. Y., 116), sustains the view of the constitution just taken. In that proceeding the right of the railroad company to the possession of the property was given upon the deposit of the money awarded, and the order of deposit was sustained because of conflicting claims upon the fund deposited. If the deposit of the money was sufficient to transfer the title to the land, the decision of the court would have been upon that ground, and the fact that the answer to the constitutional objection was found only in such dispute in regard to the title to the fund, is clear evidence that our court of last resort saw no other.

This same question has also arisen in New Jersey and was decided in *Redman* agt. *The Philadelphia, Marlton and Medford Railroad Company* (33 N. J. Eq. R., 165). The legislature had passed an act giving corporations seeking to condemn property the right to appropriate such property, when it had been duly appraised pending an appeal, on paying the money into court. The constitution of the state prohibited the taking by "individuals or private associations" of "private property for public use without just compensation first made to the owners." A provision not essentially different from ours, which, as has already been stated, provides for its taking upon a "compensation to be made therefor,"

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“when,” that is to say, “at the time that” such “private property *shall be taken* for public use.” The vice-chancellor, under the circumstances mentioned, enjoined the company from entering upon the lands appraised and constructing its road thereon.

As, then, the construction claimed for the general railroad act of the state by the railroad company, would render the act unconstitutional, such construction cannot be adopted and that claimed by the owner of the property must be sustained. Sections 17 and 19 must be read together, and the result is the conclusion, that the order for the deposit of money can only be made when there is a dispute as to the persons entitled to receive it or a disability to accept it. But in a case like the present, where the title to the money is clear and undisputed and the party is fully competent to accept and receive it, the order of confirmation must direct its payment or tender, at least, to the parties clearly entitled to it. This view of the intention of the act is strengthened by other provisions of section 19 hereinbefore given; those which require, when the second appraisal reduces the amount awarded by the first, the party to whom the amount of the first award may have been paid to refund to the company the amount of the reduction, and which authorize the court on the filing of the second report to render a judgment against the party liable to pay the same for the sum to be refunded. Very clearly these provisions assume the necessity of payment, or a tender, pending an appeal; and the omission of any provision for a deposit for the security of the owners of the property pending an appeal, or for the return of any deposit, when the valuation is reduced, is equally significant of legislative intent.

It was said upon the argument of this motion, that the company had a vital interest in obtaining a good title to the property sought to be acquired, and if the order in the form proposed by it would not transfer such title, the company would be the only sufferer. However plausible this view may seem, it is clearly unsound. Injury is always done by the entry of an illegal order. The order in the form proposed

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would attempt, at least, to transfer property in a mode forbidden by the constitution, and such an attempt clearly concerns the court, which is asked to make it, even though its provisions would be nugatory. Holding the views expressed in this opinion, the order in the form asked for by the railroad company must be refused for two reasons: 1st. It would be an attempted violation of the constitution of the State; and 2d. It would not be in accordance with the provisions of the railroad act itself.

It is proper to add, that while entertaining the views which have been given, the court feels that the railroad company, if it is willing to forego the obtainment of possession of the property pending its appeal, should have an opportunity to review the assessment. An order will therefore be made, if the company so desires, suspending the operation of the order confirming the report of the commissioners during the pendency of such appeal.

SUPREME COURT.

RICHARD PANCOAST and another agt. THE AMERICAN HEATING AND POWER COMPANY, Impleaded, &c.

Complaint — Sufficiency of — Demurrer — Chattel mortgage — Effect of non-filing.

Where a complaint prays only for an injunction against a defendant disposing of its property, that property being in the hands of a receiver, it cannot be sustained.

The non-filing of a chattel mortgage does not render it invalid as between the mortgagor and mortgagee.

Special Term, October, 1883.

Daniel S. Remsen, for plaintiffs.

C. B. Alexander and Alexander & Green, for defendants.

Pancoast agt. American Heating and Power Company.

ON demurrer on behalf of the American Heating and Power Company.

The complaint briefly stated was as follows: That in October, 1881, this defendant mortgaged its property in trust to the Farmers' Loan and Trust Company, and that the mortgage is recorded and that supplementary mortgages have been given, and that the plaintiffs are partners and that they are judgment creditors of this defendant; that an execution has been issued, and is now outstanding and in the hands of the sheriff; that none of the mortgages have been filed as chattel mortgages; that a large part of the property consists of chattels, patents and the like, as well as on real estate; that suits have been begun to foreclose these mortgages; that a receiver has been appointed in the suit who has qualified.

The prayer was for an injunction against defendant to prevent the disposal of its property.

The defendant demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action.

LARREMORE, *J.* — It appears by the complaint that on May 12, 1883, when plaintiffs recovered their judgment, the property in dispute was in the possession of a receiver appointed at the instance of the mortgagee. As between the parties to it, the mortgage was not invalid (*Jones agt. Graham*, 77 *N. Y.*, 628).

The only relief asked for against the demurrant is that it may be enjoined from doing what has already been done under the sanction of the court.

The complaint fails to show a valid cause of action against the company, and the demurrer should be sustained, with leave to plaintiffs to amend on payment of costs.

Matter of Attorney-General agt. Continental Life Insurance Company.

SUPREME COURT.

In the Matter of THE ATTORNEY-GENERAL agt. THE CONTINENTAL LIFE INSURANCE COMPANY.

Deposition to be used on a motion—Order for, how and by whom may be obtained—Code of Civil Procedure, section 885—Meaning of the word “party,” as used in this section.

In an action instituted by the attorney-general to dissolve a life insurance company, the holder of a policy in or a creditor of the corporation who has not intervened in the action should not be granted an order for the examination of a person as a witness to be used upon a motion under section 885, Code of Civil Procedure.

N. Y. Chambers, November, 1883.

THIS is a motion to vacate an order for the examination of Luther W. Frost, as a witness, and to obtain his deposition to be used upon a motion under section 885, Code of Civil Procedure.

C. E. Rushmore, for motion.

H. F. Averill, opposed.

POTTER, *J.*—The grounds of the motion are that the person procuring the order and in whose behalf the deposition is to be used is not a party to the action in which the order is granted, or if he is, then by the same reasoning the person to be examined is a party to the action. Said section provides that “where a party intends to make or oppose a motion in a court of record * * and it is necessary for him to have the affidavit or deposition of a person not a party to use upon the motion * * the court or judge authorized to make an order in the cause may in its or his discretion make an order appointing a referee to take the deposition of that person.” The residue of the section consists of the essentials of the affidavit to obtain such order, and of the practice under it.

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The object of the motion, as appears from the petition upon which the order to take the deposition was obtained, is to set aside an order made in the above entitled action directing the receiver of the defendant therein to compromise and discontinue two actions brought by him, as receiver, against said Frost in this court, to recover of him certain moneys alleged to belong to the defendant herein, and to set aside certain conveyances of premises alleged to have been purchased by said Frost with the moneys of the defendant, and the incumbrances upon said premises. The application for this order to compromise and discontinue was made, and the order granting permission to do so was entitled in and entered in this the above entitled action. It does not appear from any of the papers before me upon this motion that either said application for the order to compromise and discontinue or that the order granting leave to do so was either entitled or entered in the action brought by the receiver against said Frost.

The petitioner shows that he was a holder of a policy of insurance in his own right, issued by the defendant, and that his object is to set aside the compromise and the order permitting the compromise for the fraud of said Frost. Assuming the facts to be as stated in his petition, and that the deposition of said Frost, if obtained, would establish those facts, it would be manifest justice to the public generally and to the holders of policies in the defendant's company that the order to compromise and the compromise under it should be set aside. But that is not the question upon this motion, at least in the first instance.

The first question here is whether the means which have been taken for that end are regular and legal. I think it is plain—too plain to admit of discussion—that the word “party,” as used in section 885, Code of Civil Procedure, means a party to the action, and means the same when used to designate the person on whose behalf the examination is to be had as when used to designate the person to be exam-

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ined. The order is to be granted by a judge or court competent to make an order in the cause. The person applying for the order to examine must be a party to that cause, and the person to be examined under the order must not be. If the person to be examined is a party to the cause, his deposition can be obtained under other provisions of the Code, and if the person desiring the deposition is not a party to the cause, either by the requirements of the Code or by leave of the court, he is not presumed to have any standing in the court or any rights to be affected by the action. The name of the petitioner nowhere appears in the action, and was not a necessary or proper party to the action. The action was instituted by the attorney-general to dissolve the corporation named the Continental Life Insurance Company.

I think it quite, if not entirely, fundamental that a stockholder in a corporation is not a party to an action because the corporation is a party. Hence the necessity and frequent occasion of stockholders to apply to the court in which an action is pending between a corporation, of which they are stockholders, and other parties, for leave to intervene and become parties to the action. If stockholders in a corporation are not parties by reason of the corporation being a party, then, clearly, holders of policies in and creditors of the corporation which is a party to an action are not parties to an action because the corporation is. Stockholders, policyholders and creditors, as a general rule, are represented by the corporation, and, after its dissolution, by the receiver (*Evans* agt. *Gouge*, 69 *N. Y.*, 154; *Brewster* agt. *Hutch*, 10 *Abb. N. C.*, 400).

I see by the application and by the order granting leave to compromise, that there were several policyholders who had intervened and were represented by counsel respectively upon that application, but the petitioner had not intervened and was not, therefore, in that sense a party to this action in any way.

The motion to vacate the order must therefore be granted, with ten dollars costs of motion.

Wetmore agt. Peck.

SUPREME COURT.

BENJAMIN C. WETMORE, as executor, &c., agt. MARY A.
PECK and others.

Will — Construction of.

Where a testator devised to his wife his homestead, "with the appurtenances, containing about fourteen and one-half acres of upland, exclusive of the water grant," the words quoted is a general description of the quantity of the upland, not taking into account the extent of the water grant, which was appurtenant to it, and the latter was not intended to be excluded.

Where, at the time of the execution of the will, the premises devised to the wife were unincumbered, and the testator afterward executed a mortgage creating a lien upon the property, the widow must take the lands subject to the mortgage.

Where the testator made a gift to his wife of \$50,000, in such securities left by him as she might select, if the securities out of which the legatee may select are inadequate, the residue must be made up by the general assets of the estate, and the bequest is entitled to draw interest from the death of the testator.

Where a gift is made of an equal share of a certain sum to each of several beneficiaries, "or to their respective heirs," and one of the beneficiaries dies in the testator's lifetime, leaving children, the share of such deceased person does not lapse, but goes to his children.

Where a devise of the residue of the estate is made to the widow for life in one clause, and in the following clause such residue is directed to be divided into five equal shares, and given a share each to five beneficiaries named, "or to their respective heirs," in the event that either legatee died in the lifetime of the testator, his or her heirs take the share of the person so dying.

A lapsed legacy, not being in terms excluded therefrom, goes into the residuary, the income of which goes to the widow for life.

The executors being, in addition to a power of sale of the testator's real estate, invested with authority to lease and to mortgage it, and to invest and reinvest the estate in such securities as they may deem proper; they are also trustees, and as such are invested by implication with the legal title during the life of the widow, and the provisions stated constitute an equitable conversion of the realty into personalty, with the exception of the specific devise to the wife.

Though the legacies are made a charge upon the real estate, such charge does not affect the homestead devised to the wife; and the power and

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authority to sell is paramount to the charge of the legacies, and the lien in favor of the legatees will attach to the proceeds of the sale.

Special Term, May, 1882.

R. E. McCafferty, for plaintiff.

Nash & Kingsford, for defendant Mary A. Peck and others.

E. L. Fancher, for defendant Thompson and another.

W. & S. W. Fullerton, for defendants Georgia A. Clark and others.

—
VAN VORST, *J.*—This action is brought by the executors thereof, for the construction of the last will and testament of George H. Peck, deceased. The will bears date the 12th day of August, 1872. The testator died November 1, 1879.

The portions of the will in respect to which questions have arisen, will be considered in the order in which they are presented in the complaint.

By the first clause of his will the testator, in addition to gifts of personal property made to her, devises to his wife his homestead whereon he resided, "with the appurtenances, containing about fourteen and a-half acres of upland, exclusive of the water grant."

The question which is made in respect to this devise is whether the widow is entitled to the upland only, or also to the water grant and land under water, appurtenant to and adjoining the same?

There can be no reasonable doubt but the water grant, which proceeds from the state, by such grant became annexed to the adjoining land of the grantee. These grants convey rights and privileges of a nature inferior to the fee of the upland, and are properly within the term appurtenances (*Gerard's Title to Real Estate*, p. 715).

I do not think the testator meant to exclude this grant from the operation of the devise, and I apprehend that the words

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"fourteen and a half acres of upland, exclusive of the water grant," is a general description of the quantity of the upland, not taking into account the extent of the water grant which was appurtenant to it. This grant is therefore included within the devise to the widow.

At the time of the execution of the will by the testator, the land and premises devised to his wife were unincumbered by mortgage, but afterwards, and on the 1st day of February, 1875, the testator executed a mortgage for \$20,000, creating a lien and incumbrance to that amount upon this property, and the question presented is, whether the burden of paying this mortgage rests upon the devisee or upon the executors — or in other words, whether the land is to be taken free of incumbrances, as it existed at the date of the will?

There are cases which hold that the execution by the testator of a mortgage upon lands unincumbered at the date of his will revokes in equity the will *pro tanto* (*Redfield on Wills*, vol. 1, p. 342; *Jarman on Wills*, vol. 1, p. 151).

But the provisions of the Revised Statutes have settled the law of this state upon that subject (2 *Rev. Stat.*, 65, *sec.* 46).

It is declared, in substance by the statute, that a charge or incumbrance upon real property, for the purpose of securing money, shall not be deemed a revocation of any will relating to the same estate previously executed, but that the devise shall pass and take effect subject to such charge or incumbrance.

And it is also in substance further provided (1 *Rev. Stat.*, 749, *sec.* 4) that whenever any real estate subject to a mortgage executed by any testator shall pass to a devisee, such devisee shall satisfy and discharge such mortgage out of his own property without resorting to the executor of his ancestor, unless there be an express direction in the will that such mortgage shall be otherwise paid.

A testator, for reasons satisfactory to himself, may, after the execution of his will, impress land which he has devised with the lien of a mortgage. He may in this way, rather than by a new testamentary direction, approximate to an equalization

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of interests created by his will, although the moneys which he should in this way realize, shall be used for the purpose of improving or appreciating the value of other portions of his estate.

As the will was executed before the mortgage it could not provide for its payment by his executors, but if that had been intended by the testator, the end could have been readily attained by a codicil thereto. There is, therefore, no testamentary direction that the executors should pay the mortgage, or that the devisee should be relieved of its burden. She must, therefore, take the land subject to the mortgage, and must pay the same out of her own funds if she would have it discharged.

By the second clause of his will the testator gave to his wife the sum of \$50,000, in such securities left by him as she might select. In the case of *Colgate* agt. *Smith*—lately before me and decided in April, 1880—a provision in substance similar to this bequest was contained in the testator's will. In that case I held, as I shall now decide, that the gift is not a specific one of securities, but of money. The gift here is of the sum of \$50,000, to be satisfied out of the securities left by the testator, if sufficient, for the purpose; but if these securities, out of which the legatee may select, are inadequate, the residue must be made up by the general assets of the estate.

This legacy may be called demonstrative, as in a general way it points out property from which it may be satisfied; but the term "securities" is vague and indefinite, and the fact that what in a loose way are called securities should by the executors be called insufficient to satisfy this bequest, should not abridge the amount of the gift which should be realized by the widow to its full extent.

This bequest is entitled to draw interest from the death of the testator (*Enders* agt. *Enders*, 2. *Barb.*, 367; *Hepburn* agt. *Hepburn*, 2 *Brad.*, 74; *Parkinson* agt. *Parkinson*, *Id.*, 77; *Williamson* agt. *Williamson*, 6 *Paige*, 278).

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By the fourth clause of his will the testator gave to his niece, Laura E. Van Vranken, wife of G. Van Vranken, the sum of \$20,000, to be paid for her sole and separate use. But the legatee having died before the death of the testator, this legacy lapses, and falls into the residuary estate of the testator, and passes under the clause of the will which disposes of the residuum, of which something will be hereafter said, when that clause comes to be treated (*Jackson agt. Westervelt*, 61 *How. P. R.*, and cases there cited).

By the fifth clause of his will the testator bequeathed to Howard W. Coates, a nephew of his wife, the sum of \$1,000 per annum, to be paid to him in equal quarter yearly payments. This provision being intended, as the testator declared, for the support of his wife's nephew, should be computed from the death of the testator (*Redfield on Sur.*, 587; *Brown agt. Knapp*, 79 *N. Y.*, 136; *Booth agt. Ammerman*, 4 *Brad.*, 129). A sum sufficient to yield the amount of this annuity must be raised from the personal estate and invested.

By the sixth clause of his will the testator gave the sum of \$10,000 to be divided into three equal shares, one of said shares was to be paid to the surviving children of the testator's deceased niece Delia La Forge, another of said shares was to be paid to Benjamin W. Peck, and the other of said shares was to be paid to Cornelia Seeley, "or to their respective heirs."

Benjamin W. Peck, one of the legatees, died in the lifetime of the testator, leaving him surviving three children, and the question is presented, as to whether the share of Benjamin W. Peck lapses, or goes to his children? and the decision of that question depends upon whether or not the closing words of this bequest, "or to their respective heirs," are words of limitation only.

The word "or" standing in the same relation to the context as it does in this instance, has been sometimes in construction changed into "and." A lapse in such instance was the consequence.

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But as is stated in 1 *Jarman on Wills*, 516 (*Biglow's ed.*, 1881): "The strong tendency of the modern cases certainly is to consider the word "or" as introducing a substituted gift, in the event of the first legatee dying in the testator's lifetime—in other words, as inserted in prospect of and with a view to guard against a lapse." And this learned author cites several cases in support of this conclusion (2 *Redfield on the Law of Wills*, 166; *Dayton on Surrogates*, third ed.; *Williams on Exors.*, 1088, 1091).

Contrasting the language of this bequest, especially its closing words, which are given above, with the form in which other bequests are made, I am persuaded that the testator used the word "or" in this connection, not inadvertently, but with design, and with the intention of preventing a lapse in the event that either of the legatees should die in his lifetime leaving issue. And the construction which is given to the bequest is that the children of Delia La Forge, who were in being at the death of the testator, take, share and share alike, one-third of this sum of ten thousand dollars; that the children of Benjamin W. Peck take, share and share alike, another third, and that Cornelia S. Seely takes the remaining third.

By the eighth clause of the will the testator devises and bequeaths to his wife the use and income of all the rest, residue and remainder of his estate, real and personal whatsoever, for her own use and benefit during her natural life; and the ninth clause provides that, upon the decease of his wife, the testator devises and bequeaths all the rest, residue and remainder of his estate then remaining to be divided into five equal shares; one of said shares is given to the testator's niece, Laura E. Van Vranken, another of such shares is given to Agnes E. Thompson, another of such shares is given to Cornelia S. Seely, another of such shares is given to Benjamin W. Peck, and the other of such shares is given to Mary C. P. Coates, "or to their respective heirs."

Upon reflection I have come to the conclusion that these

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two clauses, the latter of which directly follows the other, and which relate to the residuary estate and its disposition, during the life of the testator's wife, and subsequently thereto, may be read together and without violence as one clause. The subject and its disposition is clearly one.

The lapsed legacy of twenty thousand dollars, above mentioned, is disposed of by the gifts of the residuary estate. "A residuary gift of personal estate carries not only everything not in terms disposed of, but everything that in the event turns out not to be well disposed of. A presumption arises for the residuary legatee against every one except the particular legatee, for a testator is supposed to give away his personalty from the former only for the sake of the latter" (1 *Jarman on Wills* [Bigelow's ed., 1881], 761, 762; *Hawkin's on Wills*, 40; *King* agt. *Strong*, 9 *Paige*, 94; *Banks* agt. *Phelan*, 4 *Barb.*, 80.)

The lapsed legacy, therefore, must constitute a portion of the residuum, the interest or income from which, during the life of the widow, should be paid to her, and the principal sum, after her death, should be divided among those persons to whom the residuary estate is given.

The testator could, by appropriate words, have limited the operation of the residuary clause, and might doubtless have excluded lapsed or void legacies therefrom, but that he has not done (*Betts* agt. *Betts*, 4 *Abb. N. C.*, 418, 420.) The conclusion reached is not in conflict with *Kerr* agt. *Dougherty* (79 *N. Y.*, 330). In that case the gift to his wife by the testator, in the fifteenth clause of his will, was of the income of all his estate after the "legacies are paid," and that clause was considered in connection with the eighteenth, the residuary clause, in determining what was disposed of by the latter. The conclusion reached in that case was that the void legacies were outside the operation of the residuary clause, and that they were not disposed of by the will. But it does not seem to me that there is anything in the will which takes this case

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out of the general rule, that lapsed legacies drop into and are disposed of by the residuary clause.

The legatees of the residuum do not take as a class; one-fifth is given to each, "or to their respective heirs," and in the event that either legatee had died during the lifetime of the testator, for the reasons above stated with regard to the bequest contained in the sixth clause, his or her heirs take the share of the person so dying. I am of the opinion that by the terms of the will, notably the tenth clause, the executors are invested with more than a power in respect to the sale and disposition of the testator's real estate. For in addition to a power to sell, they are invested with an authority and a right to lease and to mortgage any of the real estate when necessary, and to invest and reinvest the estate in such securities as they may deem suitable and proper, and to alter and change such investments from time to time, as occasion may require. To meet all these exigencies and demands the executors are trustees, and as such are invested by implication with the legal title for the purposes of the will during the life of the widow (*Tobias agt. Ketchum*, 32 N. Y., 319). And under the authority of *Tobias agt. Ketchum*, and the other cases there cited, the provisions made in favor of the widow must be considered to have been made in lieu of dower. As a claim of dower would so interfere with and is so repugnant to the provisions of the will, it cannot be enjoyed in addition to the testamentary gifts in the widow's favor (*La Fevre agt. Toole*, 84 N. Y., 95). The provisions of the will with respect to the power and authority of the executors in disposing of the real estate, constitute an equitable conversion of the realty into personalty, with the exception of the premises specifically devised to the wife of the testator in the first paragraph of his will.

All legacies which the executors are charged to pay, are expressly made a charge upon the testator's real estate, but such charge does not affect the homestead distinctly given to his wife, and the lien of the legacies must of necessity, as the

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provisions of the will are held to be in lieu of dower, be limited to the remaining real estate of the testator. To satisfy the legacies in full, and in order to meet the other demands of the will in respect to an equal division among the legatees of the residuary estate, an actual conversion into money will be needed, and that, under the power and duty conferred, works an equitable conversion (*Power agt. Cassidy*, 16 Hun, 294, 300; *S. C.*, 7 N. Y., 602). The power and authority to sell is, however, paramount to the charge of the legacies, and the lien in favor of the legatees will attach to the proceeds of the sale, and should, if necessary, be satisfied thereout.

The above is an exposition of all the questions raised upon the hearing, and by the briefs of the counsel engaged, and judgment is ordered in pursuance of the above conclusion.

N. Y. CITY COURT.

ADOLPH GRUNBERG, plaintiff and respondent, agt. BERNARD BLUMENLAHL, defendant and appellant.

Practice — New trial — Appeal — When right to appeal is waived by party entering upon a new trial granted by the trial judge — Need of procuring a stay.

It is a settled rule of practice that if a party proceeds under an order, or accepts any benefit thereunder, it is a waiver on his part of the right of appeal; and if after taking an appeal he proceeds under the order appealed from, or accepts any benefit thereunder, he in like manner waives his appeal.

Where the defendant obtains a verdict and the trial judge awards a new trial upon his minutes, the defendant by entering upon the new trial and accepting the chances of succeeding thereat waives his right to appeal from the order.

The remedy of the defendant in such a case was to have procured a stay of proceedings pending an appeal from the order in question.

General Term, November 1883.

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APPEAL from an order granting a new trial.

Adolph Cohen, for appellant.

Leo Bamberger, for respondent.

MCADAM, J. — It is a settled rule of practice that if a party proceeds under an order, or accepts any benefit thereunder, it is a waiver on his part of the right of appeal; and if after taking an appeal he proceeds under the order appealed from, or accepts any benefit thereunder, he in like manner waives his appeal. In other words, he must be consistent and stand by the position he elects to take. He must rely upon his appeal or abandon his right to it and act under the order. He cannot do both. He is not permitted to test the accuracy of the order by appeal, and at the same time accept any benefit which the order confers. If he seeks by appeal to reverse the order of the court, he must, in case he succeeds, leave the adverse party in the same position he was when the order appealed from was made; and if by any affirmative act of his the position of the adverse party has, as in this case, been changed, he cannot insist upon an appeal from the order previously made (*See Brady agt. Donnelly*, 1 *N. Y.*, 126; *Noble agt. Prescott*, 4 *E. D. Smith*, 139; *Ubsdell agt. Root*, 3 *Abb. Pr.*, 149; *Clark agt. Meiggs*, 10 *Bosw.*, 337; *Radway agt. Graham*, 4 *Abb. Pr.*, 468; *Lapton agt. Jewett*, 19 *id.*, 320; *Lewis agt. Irving Ins. Co., Id.*, 140, *note*; *Marvin agt. Marvin*, 11 *Abb. [N. S.]*, 97; *Platz agt. City of Cohoes*, 8 *Abb. N. C.*, 392).

It appears by the appeal book that this action was twice tried. The jury upon the first trial found for the defendant and the presiding judge, on motion of the plaintiff, ordered a new trial upon the minutes. The defendant instead of obtaining a stay pending an appeal from this order proceeded to the new trial, which the order appealed from awarded, and by this act accepted the chances of succeeding thereat, and by so doing waived the appeal from said order. If the new trial

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had resulted favorably to the defendant he could not, under the circumstances, have prosecuted his appeal from the order which awarded it; and the fact that the new trial resulted in a verdict for the plaintiff does not change the legal effect of his act. It follows, therefore, that the appeal from said order must be dismissed, with costs.

SHEA, C. J., concurs.

SUPREME COURT.

In the Matter of JAMES H. BAILEY, Receiver, &c., of the
PELHAM AND PORTCHESTER RAILROAD COMPANY.

Attorney's lien for costs — Right of attorney for railroad company to costs upon a judgment, although the company became insolvent pending the action, the costs having been paid to receiver after notice of attorney's lien — Party paying such costs to receiver after notice not protected from execution.

Where the attorney of a railroad company had a lien for his costs upon a judgment for the company, and the company, pending the action, became insolvent, the company's receiver has no title, legal or equitable, to such costs; and if the other party to the action, after notice of the attorney's lien, pay the judgment to the receiver, he is not thereby protected from execution issued on such judgment.

N. Y. Chambers, October, 1883.

William E. Walkley, for petitioner.

Harwood R. Pool, for respondent.

POTTER, J. — This is a motion, upon petition, that Joseph Pool show cause why the sheriff should not return an execution issued to him by said Pool, as attorney for the above railroad company, as satisfied, when the sheriff's fees thereon are paid, and why the petitioner should not be allowed to retain the sums that he has received upon the judgment (being the full amount thereof) on which said execution was issued.

From the papers presented by the petition of the receiver,

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and the affidavits, it appears that one Gildersleeve brought an action against the Pelham and Portchester Railroad Company, and Mr. Pool was employed by the defendant to defend said action, and did so successfully; the result being that said company recovered a judgment against the plaintiff in the action for the costs for the services which Mr. Pool rendered in the action, and his disbursements in behalf of the company.

During the pendency of the action and before the trial thereof, or the recovery of said judgment, the company was declared insolvent, and the petitioner was appointed its receiver.

The judgment for costs and disbursements was entered up by Mr. Pool on the 9th day of June, 1883, and upon the 14th day of June following, said Pool gave notice, in writing, to the plaintiff's attorney in the action in which the judgment was recovered, that he had a lien upon said judgment for his costs therein, and that the amount of said judgment be paid to him, and on the 26th day of June issued an execution upon said judgment to the Sheriff to collect the same. Nevertheless the plaintiff in said action paid the amount of said judgment to said receiver, who now asks the court by said petition to be allowed to withhold the same from said Pool, and that the Sheriff be directed to return said execution upon being paid his fees.

The receiver takes the position that he has a right to said costs by virtue of his appointment as receiver, superior even to the right of the attorney who rendered the services and advanced the money for which the judgment for costs was rendered. The receiver, in order to make his right to said costs appear more unqualified and absolute, sets forth in his petition that he had no contract or understanding with said Pool during the pendency of said action, or at any other time. By this, I suppose, is meant that he did not, as receiver, recognize said action, or Mr. Pool as his attorney in conducting the same, and so Mr. Pool can have no claim, legal or equitable, against the receiver for his services. If that is so,

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it can only go to intensify the absence of any equity in the claim that the receiver now makes, to have said costs at the expense of the person who earned them. There are some other notable features in the transactions of the receiver and other parties in this matter, but, as they are of no importance in the view I entertain of the question presented, I refrain from alluding to them particularly.

The attorney of the railroad company had a lien for his costs against the company, and the company, if not dissolved, could not deprive the attorney of them, or receive them of the other party to the action who was adjudged to pay them after notice of the attorney's lien to the deprivation of the attorney who recovered them. No notice or other step was necessary upon the part of the attorney to create his lien. His right to those costs was substantial and absolute, after notice. The courts always have protected the attorney's lien for costs in a judgment upon motion to set off reciprocal judgments between the parties to the action in which such judgments were recovered, whether for costs and damages or either.

I have failed to perceive any title to the costs in question, legal or equitable, that the receiver can maintain. We have seen the railroad company itself, if still in existence, could not, as against its attorney, hold these costs. Certainly the receiver of a dead corporation can have no better right than the corporation would have, if alive. The receiver takes the same title the corporation had in its lifetime, and takes by transfer. When the corporation ceased to be, there was no judgment in its favor against Gildersleeve, who brought his action against it; no right to any costs had been established or adjudged in favor of the corporation when it ceased or made a transfer of its assets to the receiver. This was never an asset of the corporation. It was the judgment that was rendered after its dissolution that created these costs. Where and how did the receiver become the owner of this judgment for costs or become entitled to receive these costs, especially as against Mr. Pool, the attorney?

The People *ex rel.* Burgess agt. Risley.

This motion must be denied, with ten dollars costs, to be paid by the receiver; and as he is before the court by petition, asking to have his right to the costs he has received established, I think it proper and competent for the court, in disposing of this matter, to order the receiver to pay the costs he has received, with the interest thereon from the time he received the same, to Joseph Pool, esq., the attorney of the railroad company, upon service upon the receiver of a copy of the order to be entered herein; and further, that the stay of the sheriff from collecting the said execution be vacated and the sheriff be allowed to proceed thereunder and collect his fees upon the amount of the judgment and interest.

SUPREME COURT.

THE PEOPLE *ex rel.* GEORGE BURGESS agt. JOSEPH H. RISLEY
as sheriff of Ulster county.

Criminal law — Right of prisoner to see counsel before indictment.

The provision of the constitution of New York (*art. 1 sec. 6*), which declares that "in any trial in any court whatever, the party accused shall be entitled to appear and defend in person and with counsel," gives to a prisoner every privilege which will make the presence of counsel upon the trial a valuable right, and this must include a private interview with his counsel prior to the trial.

Ulster Special Term, September, 1883.

MOTION for a *mandamus* to compel the sheriff of Ulster county to allow the relator a private interview with his counsel.

William D. Brinnier, for prisoner and motion.

A. T. Clearwater, district attorney, opposed.

WESTBROOK, *J.*—The relator, George Burgess, has been committed by a magistrate of the county of Ulster in default

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of bail to await the action of the grand jury upon a charge of burglary. The court of oyer and terminer to be held in and for the county of Ulster, at which the case will be presented for the action of the grand jury, convenes on the nineteenth day of November next.

The sheriff of Ulster county, in whose custody as the keeper of the common jail the relator is, acting in good faith and under advice which he believes to be correct, refuses to his counsel William D. Brinnier a private interview with him. The relator asks for an order allowing such an interview.

The constitution of the state (*art. 1, sec. 6*) provides that, "in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions."

In *People ex rel. Garling agt. Van Allen et al.* (55 N. Y., 31), the provision of the constitution just quoted was held applicable to a court-martial.

Perhaps the literal letter of the constitutional provision would be complied with by allowing to the accused the benefit of counsel upon the "trial," but such a construction would illustrate the truth of that part of the old legal maxim which declares: "The letter killeth," and disregard its conclusion, "while the spirit giveth life." Undoubtedly the clause of the constitution under consideration was adopted to secure to the accused person all the benefits which could flow from the employment of counsel to conduct his defense; and to give him those it is essential that he should be allowed to consult with his counsel not only during the actual trial, but prior thereto, in order to prepare for his defense. Where a right is conferred by law, everything necessary for its protection is also conferred, although not directly provided for. The privilege of the presence of counsel upon the trial would be a poor concession to the accused if the right of consultation with such counsel prior to the trial was denied. To give life and effect, therefore, to the provision of the constitution under consideration, it must be held to confer upon the relator every privi-

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lege which will make the presence of counsel upon the trial a valuable right, and this must include a private interview with his counsel prior to the trial.

It is said, however, that there is no indictment as yet against the relator, and that, therefore, the constitutional provision does not apply. This is also, it seems to me, a narrow interpretation of the fundamental law. The relator is in jail and adjudged probably guilty of a grave crime. He has rights even before indictment. He may claim, perhaps, that his detention is illegal; that the evidence taken before the magistrate was insufficient, and may desire, through counsel, to obtain a writ of *habeas corpus*, or some other process to inquire into the legality of his imprisonment. He needs for all this counsel competent to advise, and a private interview for consultation. Is he to be deprived of this because the *letter* of the fundamental law does not give it? Or shall the spirit which procured the adoption of the provision be invoked to give it life? What was that spirit? Manifestly it was a recognition of the great doctrine that, "with us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel" (*Cooley's Const. Lim.*, 335.)

No good reason can be assigned why the word *trial*, occurring in the constitution, should be construed to mean the final inquiry upon the accusation only, and not any and every step which may be taken to inquire into the imprisonment. It should, to give force and effect to the spirit which prompted it, be so construed as to give to every one accused of or arrested for crime the benefit of counsel at every step and stage of the proceeding.

This construction is demanded by every consideration of humanity, and the enlightened views of personal rights resulting from christian civilization.

Whilst holding these views, no censure is imposed either upon the sheriff or district attorney. They have both acted in good faith and with due regard for the public interests, their care and vigilance having been aroused by what they

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deemed to be suspicious conduct on the part of the prisoner. The time of the convening of the grand jury is, however, now so near that the request of the prisoner for a private interview with his counsel should be granted. The sheriff may, of course, take proper precautions to see that no instrument of escape shall be conveyed to the prisoner, and may, also, if he has good reason to suppose that the consultation with the prisoner will be used for an improper purpose, apply to the court for further instructions. Upon the facts now before me, no reason sufficient to prevent an interview by the counsel employed with the relator is shown, and the private consultation asked for must be allowed.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, respondents, agt.
MICHAEL MCTAMENEY, appellant.

Criminal law — Prisoner indicted for grand larceny may be convicted of petit larceny — Prisoner may be sentenced to imprisonment for one year for petit larceny — Penal Code, sections 7, 15, 528, 530, 531, 532, 535, 719, 726, 651 — Code of Criminal Procedure, sections 56, 444, 445.

Where a prisoner has been indicted for grand larceny, and is on trial before a jury in the court of oyer and terminer, or of the sessions, they have the power to find a verdict of petit larceny.

Petit larceny is a misdemeanor, and is punishable under section 15 of the Penal Code by imprisonment in the penitentiary or a county jail for not more than one year, or by a fine of not more than \$500, or both.

Third Department, General Term, September, 1883.

Before LEARNED, P. J., BOARDMAN and BOCKES, J.J.

AN appeal from the judgment of the Ulster sessions, sentencing the appellant to imprisonment at hard labor in the Albany penitentiary for the term of one year upon conviction of petit larceny by verdict of a jury.

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The defendant was indicted at the Ulster sessions in June, 1883, for grand larceny in the first degree. He was tried at the same term and convicted of petit larceny. His counsel moved for his discharge upon the ground that the court had no jurisdiction to pronounce sentence. The motion was denied, and the defendant was sentenced to imprisonment at hard labor in the Albany penitentiary for one year.

William Lounsbery, for appellant. 1st. The jury had no jurisdiction or power to convict, nor the court to sentence the defendant for petit larceny (*Code of Crim. Pro. sec. 56*; *Comaford agt. Dutcher*, 83 *N. Y.*, 240; *The People agt. Rawson*, 61 *Barb.*, 619; *Divine agt. The People*, 20 *Hun*, 28; 1 *Chitty*, 939; *Wallbeer's Case*, 1 *Leach*, 14; 2 *Strange*, 1133; *Dedieu agt. The People*, 22 *N. Y.*, 183; *The People agt. Jackson*, 3 *Hill*, 92). At common law on an indictment for felony there could be no conviction for misdemeanor. This rule of the common law covered all cases and was adopted by our courts (*The People agt. Jackson*, 3 *Hill*, 92; *Palmer agt. The People*, 5 *Hill*, 427; *Klein agt. The People*, 31 *N. Y.*, 229). 2d. The court had no power to pass the sentence which was imposed. Neither the Criminal nor Penal Code prescribe any punishment for petit larceny. 3 Revised Statute (*Banks' 6th ed.*), 969, section 1, makes the punishment imprisonment in a county jail not exceeding six months, or a fine not exceeding \$100, or both. This section was not repealed by the Code. Section 15, Penal Code only amends and repeals section 103 of 3 Revised Statute (*Banks' 6th ed.*), 983. In this case the sentence was imprisonment at hard labor for one year in the penitentiary.

A. T. Clearwater, district attorney of Ulster county, for the People. The conviction of petit larceny was proper. Chapter 4 of the Penal Code defines larceny, and divides the crime into three degrees: Section 528 defines larceny; section 530 defines the first degree of larceny; section 531 defines the second degree of larceny; section 532 thus defines the

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third degree of larceny: "Every other larceny is petit larceny." Section 444 of the Code of Criminal Procedure provides that, "upon an indictment for a crime, consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the crime." Section 445 provides that "in all other cases the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment." Section 35 of the Penal Code provides that "upon the trial of an indictment the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime." The last three sections cited are substantially enlarged re-enactments of the provisions of the Revised Statutes relative to the same matter (3 *R. S.* [6th ed.], 995, sec. 48; 2 *R. S.* [Edm. ed.] 735, sec. 27), and seem to cover, as they doubtless were intended to do, every possible phase of the question. Section 36 of the Penal Code substantially so states: "Where a prisoner is acquitted or convicted upon an indictment, of a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime in any other degree, nor for an attempt to commit the crime so charged, or any degree thereof." Even at common law the prisoner may be convicted of a lesser degree of a crime than that charged in the indictment, where the act itself is of the same nature as the one charged, and the means of committing it not materially different, even where the indictment does not allege the particular intent and circumstances characterizing the lesser degree (*Keefe* agt. *The People*, 40 *N. Y.*, 348). A case in which judge GROVER's opinion states with great clearness the reason of the rule (*See, also, The People* agt. *Jackson*, 3 *Hill*, 92; *Palmer* agt. *The People*, 5 *Hill*, 427). The indictment at bar, however, charged petit as well as grand larceny. Section 56 of the Code of Criminal Procedure is

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substantially a re-enactment of chapter 390 of the Laws of 1879. In *Ryan* agt. *The People* (decided at the November, 1879, term of this court and reported in 19 *Hun*, 188; affirmed by the court of appeals in 1880 and reported in 79 *N. Y.*, 593), in which a question upon the statute (*chap. 390 of the Laws of 1879*) was raised, it was said by the court of appeals that "charges," as used in that statute (and therefore in the Code of Criminal Procedure embodying the provisions of that statute), "implies an original complaint made in the first instance, preliminary to a formal trial for a crime" (*See opinion*, p. 596). 2d. The sentence pronounced was proper. Petit larceny is a misdemeanor (*Penal Code*, sec. 535). An offense specified in the Code, committed after it took effect, must be punished as in the Code prescribed (*Penal Code*, sec. 719; *Id.*, sec. 7). All inconsistent acts imposing punishment are repealed (*Penal Code*, sec. 726). A person convicted of a misdemeanor is punishable by imprisonment in a penitentiary or a county jail for not more than one year, or by a fine of not more than \$500, or by both (*Penal Code*, sec. 15).

LEARNED, *P. J.*—The Penal Code (sec. 528) defines larceny; sections 530 and 531 define grand larceny in the first and second degrees, and section 532 declares every other larceny to be petit larceny.

The prisoner was indicted for grand larceny and was convicted of petit larceny. We think that this was proper under sections 444 and 445, Code Criminal Procedure. The offense of which he was convicted was of a degree inferior to that of which he was indicted; and we do not think that section 56 of that same Code is to be construed to take from a jury in the courts of oyer and terminer and of the sessions the power to find a verdict of petit larceny when the prisoner has been indicted for grand larceny and is on trial before them for that crime.

If such construction were to be given to that section, and if such a jury should be obliged to acquit in case they were

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satisfied the stolen property was not of the value of more than twenty-five dollars, probably the prisoner could not thereafter be tried for such stealing.

The next question is as to the length of the sentence.

The sections of the Penal Code above cited are intended to take the place of 2 Revised Statute (*m. p.*) 679, section 63, and 690, section 1. Section 535 declares that petit larceny is a misdemeanor, meaning petit larceny as in that Code defined. Section 719 declares that an offense specified in the Code committed after, &c., must be punished according to the provisions of that Code. Section 15 declares the punishment of misdemeanors to be imprisonment for not more than a year or a fine of \$500, or both, unless some other punishment is specially prescribed by the Code or by some other statutory provision. No other punishment is specially prescribed by the Code for petit larceny, and none by any other statute unless 2 Revised Statute (*m. p.*) 690, section 1, be in force.

The Penal Code is a general statute intended to define nearly all offenses and to prescribe the punishment. Section 726 repeals all inconsistent acts so far as they impose any punishment for crime. The penalty imposed by the section of the Revised Statutes above cited is certainly inconsistent with that imposed by the Code. It cannot be understood that the exception made in section 15 of the Penal Code was to take away the effect of section 726.

The argument of the prisoner is that whenever a punishment had been prescribed for a misdemeanor previously to the Penal Code which was not in express and specific language repealed, that punishment remains in force.

Now, if we turn to 2 Revised Statutes (*m. p.*) 697, section 40, we find a provision for the punishment of all misdemeanors of which the punishment is not prescribed by some other statute. Therefore, according to the argument of the prisoner, a punishment is especially prescribed for every misdemeanor. And therefore every misdemeanor is excepted from section 15 of the Penal Code. This is plainly unreasonable.

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Again: The definitions of larceny in the Penal Code are not identical (in language) with those in the Revised Statutes. Therefore, that part of section 1 (2 *Revised Statutes*, m. p. 690) which defines petit larceny is not in force. Why, then, the residue of the section? The prisoner's position, if correct, would apply apparently to other cases of misdemeanors. For instance, section 651 of the Penal Code declares certain interference with gas pipes to be a misdemeanor, but prescribes no penalty. This section is substantially the act of 1854 (*ch. 109, secs. 1 and 2*), by which the crime was declared and a penalty prescribed of six months imprisonment and a fine of \$250. Are we to understand, then, that a violation of section 651 of the Penal Code is not punishable under section 15 of the same Code, but that the penalty prescribed in the act of 1854 is in force? Under such a construction the Penal Code would cease to be a complete system, as it was intended to be (*Sec. 7*).

The judgment and conviction should be affirmed.

All concur.

Judgment and conviction affirmed.

SUPREME COURT.

PATRICK FULLAN agt. JOHN HOOPER.

Injunction — when will not be granted in equity actions — not granted when want of equity is established by preponderance of proof — Sufficiency of undertaking — Code of Civil Procedure, sections 613–812.

No action in equity will lie to restrain the enforcement of a judgment rendered by a court of record on the ground that the defendant in the action in which the judgment was rendered was not served with process. The plaintiff has an adequate remedy at law by motion in the original action.

Where the whole equity of the bill is not only denied, but its want of

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equity is established by a preponderance of proof, an injunction is never granted.

There is no authority for the granting of an injunction restraining the enforcement of a judgment except on an undertaking providing absolutely for the payment of the judgment, with interest and costs.

N. Y. Chambers, November, 1883.

MOTION to vacate an injunction restraining the enforcement of a judgment in an action for a perpetual injunction.

Samuel Utermeyer, for defendant.

Cooper & Whitlock, for plaintiff, opposed.

POTTER, J. — This is a motion to set aside an injunction granted in this action to restrain the defendant from enforcing a judgment which this defendant obtained against the plaintiff in 1871. The motion must be granted upon three grounds:

First. The plaintiff has a remedy at law (*Savage agt. Allen*, 54 *N. Y.*, 458, and the cases there cited). The defect here complained of is that the summons was not served in the action in which the judgment was obtained. If such was the case the judgment would be set aside upon motion. That is perhaps the reason that no case is found when an action was brought in equity to set aside such judgment with an injunction to restrain its enforcement.

Second. The whole equity of the complaint is not only denied, but its want of equity is established by a preponderance of proof (40 *How. Pr.*, 233).

Third. The undertaking given by the plaintiff in procuring the injunction is not sufficient for that purpose (*Secs. 613 and 812, Code of Civil Procedure*).

Motion to vacate injunction granted, with ten dollars costs of motion.

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N. Y. SUPERIOR COURT.

JOHN H. GLOVER agt. THE MANHATTAN RAILWAY COMPANY
and THE NEW YORK ELEVATED RAILWAY COMPANY.

Railroads—Damages to property must be compensated.—When elevated railroad structures inconsistent with the free use of the streets—When owner of premises entitled to injunction to restrain railroad company from continuing the use of the street without compensation—When entitled to damages for such use.

The plaintiff, who is owner of premises at the corner of Greenwich and Rector streets, in the city of New York, and the owner of an easement in Greenwich street, that it shall be held by the city as a public street forever for the free and common use of all persons, and who also owns the fee of one-half of Rector street, adjoining his premises, is entitled, no matter when he became owner of the premises, to judgment restraining the defendants from continuing the use without compensation, of his property, by operating an elevated railroad upon the streets in front thereof, if the railroad structure, as erected and used, is inconsistent with the free use of the streets under the conditions of the grant to the city.

The elevated railroad structure of defendants in Greenwich street is to some extent inconsistent with such use of the street, as it prevents free access to plaintiff's lot, obscures the light and to some extent the free circulation of air, and plaintiff is entitled to damages, for the period of his ownership, for the use of his property thus appropriated by defendants.

Special Term, November, 1883.

THE facts are sufficiently stated in the opinion.

Richard L. Sreezey and John E. Parsons, for plaintiff. Plaintiff is the owner of the fee of one-half of Rector street in front of his premises. Rector street exists by dedication of Trinity church, and is in the same situation as any country highway. The description in the deeds to the plaintiff and his predecessors in title, coming down from Trinity church carries to both Greenwich and Rector streets (*Sherman agt. McKeon*, 38 N. Y., 271; *Story agt. N. Y. Elevated R. R.*

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Co., 90 *N. Y.*, 179). Before the decision in the Story case, the right of an abutting owner, who owned the fee of the street subject to the public use, to enjoin the use of the street for railroad purposes, was settled (*Williams* agt. *N. Y. Central*, 16 *N. Y.*, 97; *Henderson* agt. *Same*, 78 *N. Y.*, 423). As to Rector street, the defendants occupation is without color of legal right. They cannot acquire any right in Rector street. The acts of the legislature, under which they claim, not only give them no right to enter Rector street, but expressly prohibit their doing so (*Chap.* 489, *Laws* 1867, *secs.* 2, 3 and 4; *chap.* 595, *Laws* 1875, *sec.* 7). No right of eminent domain can be exercised with respect to Rector street. The plaintiff is entitled to an injunction and damages. As to Greenwich street the Story case is conclusive in plaintiff's favor. The plaintiff is entitled to damages for the past use by the defendants of Greenwich street, and to an injunction, subject to the power of the court to permit the defendants to acquire the plaintiff's right, upon the payment of adequate compensation. The acts of the legislature only permit the use by the company of the streets for a structure to be legalized in the mode provided (*Vide* acts of legislation above cited and especially *sec.* 7, *chap.* 489, *Laws* 1867). No stricture, embracing the platform and station in question, has been authorized. The objections made by the defendants that the plaintiff's deed is void as to the easements of his grantors in Greenwich and Rector streets is not well founded (*Crary* agt. *Goodman*, 22 *N. Y.*, 170; *Higginbotham* agt. *Stoddart*, 73 *N. Y.*, 94; *Dawley* agt. *Brown*, 79 *N. Y.*, 390; *Corning* agt. *The Troy Iron and Nail Factory*, 40 *N. Y.*, 192; *Broistedt* agt. *South Side R. R. Co.*, 55 *N. Y.*, 220; *Matter of N. Y. and E. R. R. Co.*, 70 *N. Y.*, 327). The testimony shows continual remonstrance, but not positive acquiescence, nothing short of an actual conveyance would deprive plaintiff of his right to a final injunction. On an application for a preliminary injunction before plaintiff's right had been determined, the rule

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might be different (*Williams* agt. *Henderson Cases*, *supra* ; *Calkins* agt. *B. and R. Natural Gas-Light Co.*, 1 *N. Y. S. C.* [*T. & C.*], 541). That plaintiff's deed is valid and that he is the owner of the easement which, according to the Story case, the abutting owner has in the street, and that plaintiff has the right to restrain encroachment upon this easement by injunction. Plaintiff's damages which he is entitled to recover as incident to his relief by injunction, are the diminution of the rental value of the premises from the time he bought up to the time of the trial. The measure of compensation, if the court should decide to fix a sum, upon payment of which defendants may acquire the right to remain in Greenwich street, is the difference between the market value of plaintiff's premises, the road being in the street, and what such value would be if the road was not in the street (*Matter of Prospect Park and C. I. R. R. Co.*, 16 *Hun*, 261 ; *Matter of N. Y. C. and H. R. R. Co.*, 15 *Hun*, 63 ; *Bloomfield and Nat. Gas-Light Co.* agt. *Calkins*, 1 *Sup. Ct.* [*T. & C.*], 549 ; *Henderson* agt. *N. Y. Central*, *supra* ; *Railroad act*, chap. 140, *Laws* 1850, sec. 16).

Deyo, Duer & Bauerdorf, for defendants ; *David Dudley, Field* and *Henry H. Anderson*, of counsel. Whatever questions of law it may be necessary for the courts to decide before the rights of abutting owners, as against railway corporations, are finally settled, must be disposed of in each case on its own facts and circumstances (*Greene* agt. *The New York Central and Hudson River R. R.*, 65 *How.*, 154). The plaintiff has no claims against the defendants ; but one person or owner is entitled to damages for the part of the easement destroyed by the permanent structure, and that person is the one who was owner when the damage was done (*Henderson* agt. *N. Y. C. and H. R. R. Co.*, 78 *N. Y.*, 435 ; *Williams* agt. *N. Y. C. R. R. Co.*, 16 *N. Y.*, 97 ; *Van Zandt* agt. *The Mayor, etc.*, 8 *Bosw.*, 375, 386, 389 ; *Greene* agt. *N. Y. C., etc.*, 65 *How.*, 154 ; *Powers* agt. *City of Council Bluffs*, 45 *Iowa*,

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652; *Whitbeck* agt. *Cook*, 15 *Johns.*, 400). The plaintiff cannot come in at this late day and fight the battles of his predecessors in title; the easement, so far as it has been taken by the defendants, was taken from one of the plaintiff's predecessors in title; such predecessor, and he alone, sustained damage from such taking (*Van Zandt* agt. *The Mayor, etc., of New York*, 8 *Bosw.*, 875, 389; *Greene* agt. *N. Y. C. and H. R. R. R. Co.*, 65 *How.*, 154; *Sargent* agt. *Machias*, 65 *Me.*, 591; *Neal* agt. *K. and I. R. R. Co.*, 61 *Me.*, 298; *Rand* agt. *Townshend*, 670; *Allyn* agt. *P. W. and B. R. R.*, 4 *R. I.*, 61; *Turnpike Road* agt. *Brosi*, 22 *Pa.*, 32; *Tenbrooke* agt. *Jahke*, 77 *Pa.*, 397; *Zimmerman* agt. *Union Canal Co.*, 1 *Watts & S.*, 346; *Schuylkill Nav. Co.* agt. *Thorburn* 7 *Serg. & Rawle*, 421; *Chase* agt. *N. Y. C. R. R.*, 24 *Barb.* 273; *Schuylkill and Susq. Nav. Co.* agt. *Decker*, 2 *Watts*, 343; *McLendon* agt. *Atlantic and W. P. R. R.*, 54 *Ga.*, 293; *Pomeroy, executor*, agt. *Chic. and Mil. R. R.*, 25 *Wis.*, 643).

INGRAHAM, *J.* — The complaint in this action alleges in substance that plaintiff is the owner and possessor of certain property in the city of New York, on the south-east corner of Greenwich and Rector streets, and of portions of Greenwich and Rector streets immediately in front of and adjoining the same to the center of said streets respectively. That the defendants, the New York Elevated Railroad Company, are the owners of a railroad running through said Greenwich street, past and in front of said premises owned by plaintiff, and that said railroad is now operated by the defendants, the Manhattan Elevated Railroad Company, as the lessees and agents of the New York Elevated Railroad Company. That in Rector street the defendants have constructed a depot from the said railroad in Greenwich street, and extending through Rector street beyond the rear line of the plaintiff's property. That the said railroad and other structures erected by the defendants occupies and greatly obstructs the streets and pas-

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sageway to and from the plaintiff's property, and occupies and uses plaintiff's property in the said streets without the consent of the plaintiff, or without having paid compensation therefor, and prays that defendants may be enjoined from maintaining, continuing or operating said railroad and structures now existing in said streets in front of said premises; that they be compelled to take down and remove the same, and plaintiff have judgment for the damages sustained by virtue of the continuance of such structure and railroad.

The action, therefore, is one brought on the equity side of the court to restrain the defendants from the unauthorized use of the plaintiff's property, and to recover such damages as plaintiff has sustained by reason of such unauthorized use.

The learned counsel for the defendants insist that as at the time such damages were sustained and the road was built, plaintiff was not the owner of the property and defendants did not build the road, plaintiff cannot recover; but it seems to me that this position mistakes the theory on which the action is brought. It is not that the defendants are liable to plaintiff for building the road, but that they are liable for the use by them of plaintiff's property.

Plaintiff claims that he has certain property in the streets which defendants use, and use without plaintiff's consent and without paying him compensation therefor, and plaintiff asks the court to enjoin the further use of the property. The damages asked are only such as plaintiff has sustained by the unauthorized use of such property by defendants, since plaintiff became its owner.

The building of the road is not complained of, the use of the road before plaintiff purchased is not complained of, but the occupation and use of plaintiff's property in the future, is what the plaintiff asks the court to restrain, and for the use of such property since he purchased it, plaintiff asks compensation. That such an action can be maintained is well settled in this state (*Williams agt. N. Y. C. R. R. Co.*, 16 *N.*

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Y., 97; *S. C.* agt. *N. Y. C. R. R. Co.*, 78 *N. Y.*, 423; *Story* agt. *N. Y. Elevated R. R. Co.*, 90 *N. Y.*, 179).

The court of appeals in the *Story* case has decided that plaintiff in that case had an easement in the streets in front of his premises, and that he was entitled to an injunction restraining the use by the railroad company of such property. It can make no difference at what time he became the owner of the property, but he is entitled to be protected against an unauthorized appropriation, whether it was acquired by him before the defendants appropriated it or the day before the commencement of the action.

The principal question to be determined is what property, if any, plaintiff has in Greenwich and Rector streets, in front of and adjoining his lot, that has been appropriated by the railroad company.

The lot in question was included in a large tract of land which was granted in the year 1705 to "the rector and inhabitants of the city of New York in communion of the church of England, as by law established," a corporation created by royal charters. The name of such corporation was by law changed to the rector, church-wardens and vestrymen of Trinity church in the city of New York. The corporation caused the property to be surveyed and laid out in lots by Francis Maerrehalk, about the year 1761. On that map appears a street without name, running from Broadway to Lumber (now Church) street, twenty feet wide, which corresponds with a portion of the present Rector street, and a street called First street, forty feet wide, which corresponds with the easterly portion of Greenwich street.

By a conveyance dated April 9, 1761, the church corporation remised, released and quit-claimed, to the mayor, aldermen and commonalty of the city of New York, the said streets, as they are particularly laid out, described and named in said map: "to have and to hold all and singular the said several and respective streets unto the said mayor, etc., and their successors, to be, remain and continue forever hereafter

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for the free and common passage of, and public streets and ways for, the inhabitants of the said city of New York, and all others passing and returning through or by the same, in like manner in the other public streets of the said city now are or lawfully ought to be." And this conveyance was accepted by the city of New York. It appears that subsequently Rector street was extended to the river, and First street was widened and called Greenwich street. The exact date of such extension does not appear, but on a map dated 1815, both streets appear substantially as they now exist.

The fee of Greenwich street, in front of plaintiff's property, passed in the city of New York by the deed from the church corporation, dated 1761, but by the conveyance of the property conveyed, was to be held by the city as a public street forever. The city accepted the conveyance subject to this condition, and this, I think, gave the owners of the adjoining property the right and privilege of having the street kept open forever as such, under the principle laid down by the court of appeals in the case of *Story agt. The New York Elevated Railroad Company* (90 N. Y., 145). And that case decided that such a right was "an incorporeal hereditament. That it became at once appurtenant to the lot, and formed an integral part of the estate in it, and that it constituted a perpetual incumbrance upon the land burdened with it. The lot became the dominant and open way or street the servient tenement."

The extent of this easement on Greenwich street has, I think, also been settled by the court of appeals in the *Story* case (90 N. Y., 122). Judge DANFORTH (*page* 146) says: "Generally it may be said it (the easement) is to have the street kept open so that from it access may be had to the lot, and light and air furnished across the open way. * * * That above the surface there can be no lawful obstruction to the access of light and air to the detriment of the abutting owner."

In regard to Rector street it does not appear that the fee of the street was ever acquired by the city, but I think that from

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the evidence it may be assumed that prior to the year 1815 the church had opened the street from Broadway to the river and had dedicated it for a public street.

By a deed dated July 13, 1843, Trinity church corporation conveys to Jacob Fash a piece of land known as lot 47, bounded westwardly, in front, by Greenwich street, northwardly, on one side, by Rector street, and which by several conveyances became vested in the plaintiff.

The fee of half of the streets in front of plaintiff's property that had not been conveyed or released by the Trinity church corporation to the city, passed by the deed to Fash and, through the various conveyances, to the plaintiff (*Sherman agt. McKeon*, 38 *N. Y.*, 266; *Story case, opinion of TRACY, J.*, 90 *N. Y.*, 165).

So that it appeared that the fee of Greenwich street was in the city, subject to the easement appurtenant to plaintiff's lot, and that the fee of one-half of Rector street to front of plaintiff's property was vested in plaintiff, subject to its use as a public street.

It was held in the case of *Williams agt. The New York Central Railroad Company* (16 *N. Y.*, 97), that in such a case "the public acquired nothing beyond the mere right of passing and repassing upon the highway, and that in all other respects the rights of the original owner remained unimpaired, and again it cannot be successfully contended either that the dedication of land for a highway gives to the public an unlimited use or that the legislature has the power to encroach upon the reserved rights of the owner by materially enlarging or changing the nature of the public easement;" and held that to allow a railway track to be constructed on a highway is a material enlargement of the uses to which the highway was originally dedicated, "and that the legislature had no power to give a railroad the right to build upon the highway without compensation to the owner of the fee."

That the structure as erected and used by the defendants in Greenwich street is to some extent inconsistent with the use

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of such street under the conditions of the grant to the city of New York is, I think, established by the evidence. It prevents to some extent the free access to plaintiff's lot; it obscures the light, and, to some extent, the free circulation of air. This point was directly involved in the *Story case* (*supra*). Judge TRACY says (*page* 170): "We think such a structure closes the street *pro tanto*, and this directly invades the plaintiff's easement in the street as secured by the grant to the city. * * * The defendants' railroad, as authorized by the legislature, directly encroaches upon plaintiff's easement, and appropriated his property to the uses and purposes of the corporation. This constitutes a taking of property for public uses. It follows that such a taking cannot be authorized except upon condition that defendants make compensation to the plaintiff for the property taken."

The cases cited by defendants have all been examined, but so far as any of them are in conflict with the rules laid down, they must be held to be overruled by the cases above cited.

It follows, therefore, that if plaintiff is the owner of the easement in Greenwich street and the fee of Rector street, that he is entitled to judgment restraining the defendants from continuing to use his property.

It was argued on the motion for a nonsuit, and again on summing up, that as at the time of the conveyance to plaintiff defendants were in possession of the property claimed by plaintiff, that no titles to the easement or property passed by the deed under 1 Revised Statutes, section 147, page 739.

The court of appeals, in the case of *Corning agt. Troy Iron and Nail Factory*, decided that the statute does not apply to the holding of a right appurtenant to land, but only to the land itself. The statute does not prevent the title to the half of Rector street from passing by the deed to plaintiff, as the possession of the railroad company must be presumed to be in subordination to the rights of the owner. The evidence would not justify me in finding that it was adverse to him (*Broie-stedt agt. The South Side R. R. Co.*, 55 N. Y., 220).

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I have carefully considered the arguments and authorities to which my attention has been called by the learned counsel for the defendant, and I am of the opinion that the defendants have appropriated, and are using, the property of the plaintiff without his consent and without compensation, and that plaintiff is entitled to judgment.

The remaining question is to what damages, if any, is the plaintiff entitled for the use of the premises since he acquired title to the property on the 7th day of January, 1882. The evidence of the rental value of the property belonging to plaintiff appropriated and used by defendants is extremely unsatisfactory. The only evidence is the opinions of experts of the depreciation in the rental of the premises in consequence of the existence of the railroad station; and there is no direct evidence of the rental value of plaintiff's easement of light, air and right of access.

From all the evidence, however, I think that plaintiff should recover \$500 per year for the use of his property appropriated and used by the defendants.

It was my intention on the trial of the case to follow the rule laid down in *Henderson agt. New York Central Railroad Company*, and which was affirmed in 78 *New York*, 424, and find the value of the plaintiff's easement, and provide in the judgment that if defendants pay to plaintiff the sum so found as the value of the premises appropriated by defendants, the injunction asked for should be denied.

The defendants, however, have not asked for such a finding, and such a finding would be for their benefit, and the evidence is so unsatisfactory as to the value of such easement used by the defendant, that I have concluded simply to order judgment for the plaintiff, that the defendants be enjoined and restrained from using the property of the plaintiff in Greenwich and Rector streets, and that the plaintiff recover from the defendants the sum of \$500 for each year from the time plaintiff became the owner of the said property to the entry of judgment, as damage for the use of such property

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by defendants, allowing defendants to take such proceedings to acquire the property as they may be advised.

In consequence of this view of the case it will not be necessary to determine the right of defendants to use Rector street for the stations. I think, however, I should follow the suggestions of judge TRACEY in the Story case, and direct that the injunction should not issue until the defendants have had a reasonable time after the entry of judgment to acquire plaintiff's property either by agreement or by proceedings to condemn the same, and I think such reasonable time would be six months after the entry of judgment.

Judgment is therefore ordered for the plaintiff in accordance with the views contained in this opinion, with costs.

U. S. CIRCUIT COURT.

JOHN AUSTIN agt. JAMES SELIGMAN *et al.*

Contract — Right of a third party to sue upon a contract to which he is not privy — Bailment — Sale — Exchange — Partnership.

If the complaint sets forth a cause of action either in tort or assumpsit, it is sufficient, and the plaintiff will recover such a judgment as the facts warrant irrespective of the form of the action.

Where the complaint alleged that some time prior to April 15, 1883, the plaintiff delivered to K. & Co. certain jeweler's sweepings to be refined, and agreed to pay the firm a certain price for refining the same. By the terms of the agreement between them, the sweepings were to be refined, and the product thereof delivered to or accounted for, and the value thereof, less the agreed price for refining the same, paid to the plaintiff within twenty days from the delivery thereof. It further alleges that on April 13, 1883, K. & Co. transferred and delivered all the property at their refinery works, including the said sweepings, to defendants, upon the agreement that defendants should fully pay and discharge all the debts, obligations and liabilities of K. & Co. It then avers that twenty days have elapsed since the delivery of the sweepings to K. & Co., and the plaintiffs have demanded of them and of the defendants the return of the sweepings, or, in default thereof, the delivery of the

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product or value, upon payment of the agreed price for refining the same; that defendants and K. & Co. have neglected and refused to comply with the demand. On demurrer to the complaint:

Held, first, that the delivery of the sweepings to K. & Co. was not a bailment because they had a right to return money in its place and trover is not an appropriate remedy.

Second. That plaintiff cannot maintain assumpsit upon the agreement set forth, because there is no recognition in it of any liability to him and nothing to indicate that any claim of his was present to the contemplation of the parties.

Southern District of New York, November, 1883.

Thomas M. North, for plaintiff.

Jessie W. Lilienthal, for defendant.

WALLACE, J. — The complaint demurred to alleges that some time prior to April 15, 1883, the plaintiff delivered to the firm of Kempf & Co., certain jeweler's sweepings to be refined, of the value of \$4,299, and agreed to pay that firm for refining the sweepings the sum of \$320. That by the terms of the agreement between them the sweepings were to be refined, "and the product thereof delivered to or accounted for, and the value thereof less the agreed price for refining the same paid to the plaintiff within twenty days from the delivery thereof." The complaint further alleges that on the 13th day of April, 1883, the firm of Kempf & Co. transferred and delivered all the property at the refinery works of the firm, including the aforesaid sweepings, to the defendants, upon the agreement and undertaking that the defendants should "fully pay and discharge all the debts, obligations and liabilities of Kempf & Co." The complaint then avers that twenty days have elapsed since the delivery of the sweepings to Kempf & Co., and although the plaintiffs have demanded of them and of the defendants the return of the sweepings, or, in default thereof, the delivery of the product or the value upon payment of the agreed price for refining the same, that

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defendants and the said firm of Kempf & Co. have neglected and refused to comply with the demand.

Under the rules of pleading which obtain in the courts of this state, if the complaint sets forth a cause of action either in tort or assumpsit it is sufficient, and the plaintiff will recover such a judgment as the facts warrant irrespective of the form of his action. It is urged for the plaintiff that he can maintain either trover or assumpsit upon the facts alleged. If the delivery of the sweepings was a bailment, trover is an appropriate remedy, because the title to the property remained in the plaintiff, and a demand and refusal to return it to him by the defendants, is sufficient evidence of a conversion, whether defendants were innocent purchasers or otherwise. But the rule is well settled that when by the terms of the contract under which property is delivered by an owner to another, the latter is under no obligation to return the specific property either in its identical form or in some other form in which its identity may be traced, but is authorized to substitute something else in its place, either money or some other equivalent, the transaction is not a bailment, but is a sale or exchange. Here the agreement was that Kempf & Co. should return the refined product of the sweepings or account for the value less the price for refining. They had an option which was inconsistent with the character of a bailment (*Hund agt. West*, 7 *Conn.*, 75; *Smith agt. Clark*, 21 *Wend.*, 83; *Foster agt. Pettibone*, 3 *Seld.*, 433; *Buffum agt. Merry*, 3 *Mason*, 478; *Chase agt. Washburn*, 1 *Ohio St.*, 244; *Ewing agt. French*, 1 *Black*, 353; *Schouler's Bailments*, 5).

The case is not one where they had possession of the plaintiff's property under an executory agreement to purchase, but one where the title passed on delivery unless the delivery was a bailment. It was not a bailment if they had a right to return money in its place. Unless the plaintiffs can recover in assumpsit upon the promise made by the defendants to Kempf & Co., to assume all the debts, obligations and liabilities of the latter, the complaint fails to show a cause of action.

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He was not a party to the contract, nor did its consideration move from him, and there is nothing in its terms to indicate that it was intended to be made for his benefit.

The case thus presents the much vexed question as to the right of a third person to maintain assumpsit upon a contract which may inure to his benefit but to which he is not a party. It is stated in *Hilliard on Contracts* (425) that "the cases on this subject are very discordant, the earliest decisions holding that such action cannot be maintained. Many succeeding cases in England holding the contrary, and some American cases of high authority tending strongly to restore the old doctrine."

The subject has been recently somewhat considered in two cases in the supreme court of the United States. Mr. justice DAVIS, delivering the opinion of the court in *Hendrick agt. Lindsay* (93 U. S., 143), says: "The right of a party to maintain assumpsit on a promise, not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." Mr. justice STRONG, delivering the opinion of the court in the *National Bank agt. Grand Lodge* (98 U. S., 123), says: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of the action of assumpsit. The subject has been much debated and the decisions are not all reconcilable. No doubt the general rule is that such privity must exist. Undoubtedly there are many exceptions to it.

* * * But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and, if the original creditor can also sue, the promisor would be liable to separate actions, and, therefore, the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract

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is required." There are adjudications which hold broadly that, in a case like the present, where one party assumes to pay all the debts of the other a creditor of the promisee may maintain assumpsit against the promisor. Such a case is *Joslyn agt. New Jersey Car Company* (46 *N. J.*, 141). There are others which hold that where the promisor undertakes to pay certain specified creditors or debts of the promisee, the creditor can maintain suit against the promisor. Such a case is *Brown agt. Curran* (14 *Hun*, 260). Other cases decide that although by the agreement one of the parties undertakes, in general terms, to assume or pay all the debts of the other, if the agreement appears to be primarily intended for the benefit of the promisee, he is the only person who can recover upon the promise (*National Bank agt. Grand Lodge*, 98 *U. S.*, 123; *Dorr agt. Clark*, 7 *Gray*, 198; *Merrill agt. Green*, 55 *N. Y.*, 270; *Pardee agt. Treat*, 82 *N. Y.*, 385).

It will not be profitable to attempt to collate the authorities upon the general question.

In England it is now distinctly established, so far as any common law right of action is concerned, that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may (*Pollock, Cont.*, 196). While in both Massachusetts and New York the later decisions limit more strictly the exceptions to the general rule, that the person must sue to whom the promise is made. Neither in these decisions nor elsewhere in this country has the English rule been recognized. It has the merit of simplicity, but is artificial instead of being reasonable.

According to good sense and upon principle, there is no reason why a person may not maintain an action upon a contract although not a party to it, when the parties to the contract intend that he may do so. The formal or immediate parties to a contract are not always the persons who have the most substantial interest in its performance; sometimes a third person is exclusively interested in its fulfilment. If the parties choose to treat him as the primary party in interest, they rec-

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ognize him as a party in fact to the consideration and promise. And the result of the better considered decisions is, that a third person may enforce a contract made by others for his benefit, whenever it is manifest from the nature or terms of the agreement that the parties intended to treat him as the person primarily interested. The cases of *Hendrick* agt. *Lindsay* and *National Bank* agt. *Grand Lodge*, and the expressions in these opinions do not antagonize upon this proposition, but accord with it.

The language of FOLGER, J., in *Simson* agt. *Brown* (68 *N. Y.*, 355), may be adopted as a correct and accurate statement of the law, as follows: "It is not every promise made by one to another, from the performance of which a benefit may inure to a third person, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

There is a class of cases where, under a contract between two persons, property has come to the hands of one of them, which in equity is charged with a lien or trust in favor of a third person, in which the latter may sue in his own name upon the promise to discharge the lien or assume the trust. These cases have no proper application to a case like the present, where a copartnership transfers its assets to a purchaser and the only interest of the plaintiff is that of a creditor at large of the selling partners. Such creditors have no lien for their debts upon the partnership assets, except in cases of insolvency or administration (*Colyer on Part.*, sec. 324; *Story Part.*, secs. 358, 360; *Crippen* agt. *Hudson*, 13 *N. Y.*, 161).

If on such a transfer the purchaser assumed to pay certain specified creditors or certain enumerated debts of the seller, it may be fairly urged that the parties contemplate a direct liability to the specified creditor on the part of the purchaser. On the other hand, when the agreement is silent respecting

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any specific obligation to be assumed to a third person, the natural inference is that it was intended primarily for the benefit of the promisee and to adjust the rights and duties of the parties as between themselves.

Applying this criterion to the case in hand, the plaintiff cannot maintain assumpsit upon the agreement set forth, because there is no recognition in it of any liability to him and nothing to indicate that any claim of his was present to the contemplation of the parties.

The demurrer is sustained.

SUPREME COURT.

DAVID DOWS and others agt. THE VILLAGE OF IRVINGTON and others.

Office and officers — Assessment — When trustees of a village are officers de facto and competent to lay an assessment — Election — Irregularities which will not be rectified in the courts — Defects which will not be inquired into collaterally.

The fact that the president and trustees of the village of Irvington failed to take the prescribed oath of office before entering upon the performance of their duties as such trustees and president, does not affect the validity of their action in organizing themselves into a board of water commissioners under the act of 1875, chapter 181, to furnish water to said village; they having taken possession of their offices and the public having acquiesced in their claim and tenure, they are officers *de facto* and competent to lay an assessment.

Irregularities in an election which would not change the result will not be rectified in the courts. If an election is irregular, *certiorari* is the proper remedy.

The defects that the assessment-roll was made by officers who had not qualified, and contained names not properly on it, and omitted others which ought to have been on, cannot be inquired into collaterally.

Special Term, August, 1883.

John A. Bryan and Samuel E. Lyon, for plaintiffs.

L. T. Yale, for defendants.

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DYKMAN, *J.* — The individual defendants are president and trustees of the village of Irvington, in Westchester county. Under the act of 1875 (*chap.* 181) these gentlemen organized themselves into a board of water commissioners to furnish water to the inhabitants of their village, and pursuant to the statute held an election and submitted to the village the question whether it would have water introduced or not. A majority of the votes having been cast in favor of the project, the water commissioners were about to proceed when the plaintiffs intervened and in this action secured a preliminary injunction restraining any further action on the defendants' part.

The case is now submitted for judgment on a statement of facts agreed to by both plaintiffs and defendants.

The plaintiffs are taxpayers and, under the taxpayers' act of 1872, allege that the defendants' project involves waste and injury to the property of the village of Irvington. It is not alleged that funds in possession or expectation will be squandered; but the plaintiffs rest their case on the proposition that contracts will be executed by the defendants, and bonds issued or an assessment laid, while neither contracts, bonds nor assessment will be valid.

It will be assumed to be within the taxpayers' act to prevent any village from falling into such a plight.

The invalidity of contracts and assessment is claimed to result from three facts: 1. That the individual defendants acted without taking the oath of office prescribe!. 2. That the assessment-roll of 1882, used in the election referred to, was invalid and avoids the election. 3. That at the election votes were improperly received and excluded.

Let it be conceded that the oath which the defendants took and subscribed was an idle ceremony, because it was administered by an officer lacking authority. Nevertheless, these gentlemen took possession of the office and the public have acquiesced in their claim and tenure. They are, therefore, officers *de facto* and competent to lay an assessment.

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Judge COOLEY, writing on taxation, defines an officer *de facto* "to be one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law" (*Cooley on Taxation*, 185). "The public acquiescence and reputation attach certain important consequences to his occupation of the office which the interest of the state does not permit to depend upon his own motives or the degree of plausibility which attaches to his claim." "It has sometimes been urged that in tax proceedings there was no proper room for the application of the doctrine which is applied in other cases in support of action by officers *de facto*, that the proceedings are summary and for the most part *ex parte*, that they may deprive the owner of his freehold by means of process, which usually and perhaps necessarily is somewhat arbitrary, and that he is therefore entitled of right to have all the security which the law intended he should have in the character and standing of an officer duly and properly chosen for the particular duty *in the official oath of such an officer* when one is required by law; in the official bond if one is made necessary, and indeed such security as would be afforded by a strict compliance with every provision which has been made by the revenue laws for the protection of taxpayers. The reasons are plausible, but they are not very conclusive. Indeed, if official action of officers *de facto* in judicial positions can be sustained as often as it has been, though not only property but also liberty may depend upon it, it is difficult to suggest any distinguishing reason to remove tax cases from the application of the same principle. The clear and very strong preponderance of authority is that the general policy of the law requires the acts of officers *de facto* to be sustained under the same circumstances and on the same reasons that sustain them in others" (*Ibid*, p. 190).

The case of *Merritt agt. The Village of Portchester* (71 N. Y., 309), is cited by the plaintiff and is opposed to the doctrine of judge COOLEY's treatise.

Several years later the same court, with many members

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still sitting, decided *The Matter of the Petition of Kendall* (85 N. Y., 362). This proceeding was to vacate an assessment because commissioners to examine all such contracts in New York, and who certified that this one was free from fraud, had failed to take the oath of office. The assessment was held valid as the act of officers *de facto*.

"It would be a monstrous proposition," writes judge EARL, "to hold that the action of town assessors or of trustees of villages, who, under the general village act perform the duties of assessors was void because they had neglected to take any official oath. It is no answer to the validity of the action of these commissioners as *de facto* officers, that their action could result in taking private property for assessments which might be consequent upon their action."

These decisions are reconciled by the reflection that the commissioners of estimate and apportionment in the Portchester case were not public officers, while the commissioners in the Matter of Kendall were.

Judge PLATT, *In the Matter of Attorneys* (20 Johns., 493), defined office to be "an employment on behalf of the government, in any station or public trust not merely transient, occasional or incidental." Tried by this test, the commissioners in the Portchester case fall outside the definition of office. Their employment was transient and incidental to the larger scheme which the trustees of that village were conducting. On the other hand the commissioners in the Kendall case were appointed by the legislature to examine every public improvement in New York city for which an assessment had been laid, and certify whether each was free from fraud. These commissioners were public officers.

There is another test. The appointment of commissioners of estimate and apportionment has from time to time been entrusted to the courts by the legislature, and no question made of the constitutionality of the practice. Yet the constitution forbade the legislature to intrust to the courts appointment to public office (*Const. of 1846, art. 6, sec. 8*).

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Such officers as the court can appoint are not public officers (*Matter of Hathaway*, 71 N. Y., 242).

The Portchester commissioners, like referees, commissioners of appraisal, and the like, are not public officers, and could not claim to be *de facto* officials. On the contrary, the commissioners in the Kendall, and the village trustees in this case, are public officers and can claim *de facto* powers (*People agt. Bartlett*, 6 Wend., 422).

It is a canon of election law that irregularities which would not change the result will not be rectified in the courts (*Dillon on Municipal Corporations* [3d ed.], sec. 197, n. 3). This disposes of the irregularities complained of in this case, for it is not pretended that the vote would have been adverse to the introduction of water into Irvington had all the disputed votes gone against it. If the election was irregular, *certiorari* is the plaintiff's remedy.

It is alleged that the assessment-roll of 1882 was made by officers who had not qualified and contains names not properly on it, and omits others which ought to be. Those defects cannot be inquired into collaterally.

Judgment should be for the defendants, dismissing the complaint upon the merits, with costs, and with leave to try the remaining questions in issue.

N. Y. CITY COURT.

HERMAN F. KRAUSE agt. HORATIO F. AVERILL.

Appearance — Answer — Practice — Code of Civil Procedure, sections 421, 422 — Effect of an order extending time to answer.

An order extending time to answer is equivalent to a notice of appearance.

Special Term, November, 1883.

Charles E. Lexow, for plaintiff.

William J. Cannon, for defendant.

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HAWES, J.—It appears that the defendant in this case obtained an order extending time to answer, and served the same upon plaintiff's attorney, but served no formal notice of appearance. Judgment was entered by plaintiff as for want of an answer, and no notice of subsequent proceedings was served upon defendant's attorney, and the question now presented is whether sections 421 and 422 of the Code has so modified the former practice that the order of extension and papers upon which it is based are void. The case of *Couch* agt. *Mullane* (63 *How.*, 79) would seem in its language to sustain the plaintiff's theory, and, to a certain extent, the same may be said of the case of *Douglas* agt. *Huberstro* (58 *How.*, 276), although in the latter case the question here presented was not necessarily involved. Upon an examination of the statute I am unable to discover any such radical changes in the practice as these decisions would seem to imply. Section 421 is a substitute for section 130 of the Code of Procedure, and defines in terms the requisites of a formal notice of appearance when such appearance is made; but these formal requisites were substantially the same as those existing under the old practice; and under the strictest construction their specific requirements were demanded only when the appearance was to meet certain well-known provisions of the statute. It seems to me, however, that because section 421 of the Code has prescribed a certain form in which the defendant's attorney must add his signature to a notice of appearance, demurrer or answer, that the paper so served is not void even though it should vary somewhat in that regard. In the case at bar (and the same may be said of all similar cases) the attorney, under oath, in his application for the order, states that he is the attorney for the defendant in the above entitled action, and he is so described in the affidavit of merits sworn to by the defendant. The papers are indorsed by the attorney as attorney for the defendant, and his office address also indorsed in the usual manner. These papers so indorsed, including the order of the court extending

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time to defendant to answer, were served upon the plaintiff's attorney within the required time. The court acting upon the papers submitted, extends defendant's time to answer. Can it be claimed that under such circumstances the court acquired no jurisdiction to grant the order, and is not this a substantial test as to whether it was or was not a void appearance? The fact is, as it seems to me, that the act was one which took place during the progress of the case, and that the defendant has submitted to the jurisdiction of the court and he is estopped from denying its validity. The plaintiff deems it invalid, but the most he can claim is that it is irregular, even though there was no order of the court. If, however, the court had power to make the order, it is valid until set aside. The question of jurisdiction in such a case is fully discussed in *Cooley agt. Lawrence* (5 *Duer*, 610), where the whole issue depended upon its determination, and it was decided that the power was complete. It would seem to be elementary in view of the accompanying facts which appear in this and kindred cases. If, therefore, the court had power to grant the order, the position of the plaintiff is indefensible in any phase of the case. But aside from this I do not think, as said above, that the provisions of section 421 are in any material aspect different from the former practice as would seem to be implied in the decisions above referred to. The body of the notice of appearance was precisely alike under the former and the present practice. Under the former, rule 10 required that "on all papers served, the attorney, besides subscribing his name, shall add thereto his place of business." This is substantially embodied in section 421 of the Code, and the decisions which apply to the question in its different phases are equally applicable, and certainly a slight variance in that regard would not, in my opinion, make the order wholly void. Admitting that such an appearance would be voidable under the provision of the Code, I think that it had sufficient life to give to the

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court jurisdiction to make the order, and if so, it was sufficient to bind the plaintiff until vacated.

Plaintiff must accept service of the order; no costs to either party.

SUPREME COURT.

LAZARUS S. MURAD, respondent, agt. ELLIS R. THOMAS,
impleaded, &c., appellant.

Contempt — Commitment for — Discharge from imprisonment on habeas corpus — Prisoner not privileged as a party in attendance upon such proceeding so as to relieve him from arrest under a further commitment for same contempt — Practice — Code of Civil Procedure, section 3043.

A defendant who while seeking release upon *habeas corpus* from imprisonment under a commitment for violation of an injunction on the ground of insufficiency of the commitment itself, is not entitled to be released from a further commitment, immediately succeeding his discharge, for the reason that he was privileged as a party in attendance upon the other proceeding.

First Department, General Term, June, 1883.

Before DAVIS, P. J., DANIELS and BRADY, JJ.

APPEAL from an order denying a motion to set aside a commitment.

S. Cooke, for appellant.

S. F. Kneeland, for respondent.

DANIELS, J. — A fine had been imposed upon the defendant by an order of the court because of his violation of an injunction, and his commitment was ordered until he should pay the fine or be otherwise sooner discharged by the court. Under this order a commitment had been issued upon which the defendant was arrested and committed to prison, and he applied for his discharge from the imprisonment by *habeas*

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corpus on the ground of insufficiency of the commitment itself. During the pendency of that proceeding he was committed to the custody of his counsel and appeared in person, when it was finally decided and an order made for his discharge. Immediately succeeding this order a further commitment was issued, upon which the defendant was at once arrested, and he applied to be relieved from that arrest for the reason that he was a party in attendance upon the other proceeding. But for all the purposes of the case, he continued in custody from the time when he was brought before the judge by the *habeas corpus* until the order was made for his discharge. Theoretically, as well as in fact, he was during the whole time under restraint, and could not therefore entitle himself to be relieved from the second commitment on any ground of privilege from arrest. This second commitment was issued to supply the defects found to exist in the one which preceded it, and for that reason it was sanctioned by the practice of the court (*Snyder* agt. *Van Ingen*, 9 *Hun*, 569). It was warranted by the order itself, which directed the effectual imprisonment of the defendant until he should pay the fine imposed upon him or be otherwise discharged, and that, under the circumstances, could only be secured by issuing and executing the second commitment.

It was also objected in support of the application that the present commitment was not a legal exercise of the authority of the court, but the fact that it may have contained a statement of more than was necessary to carry the order into effect, can in no way impair its efficiency. It did fully recite and set forth the substance of the order, and in that manner clearly showed the liability of the defendant to imprisonment. And that other additional matters were stated tending further to support the plaintiff's right to commit him to custody, in no manner invalidated or abridged the effect of the commitment. It was very full and complete, and the case of *The People* agt. *Bergen* (6 *Hun*, 267), is not an authority in any manner relieving the defendant from imprisonment under the

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commitment. There it appeared that there was no legal foundation for the order itself, while in the present case the validity of the order cannot be drawn in question (*Rodriguez* agt. *East River Savings Institution*, 76 N. Y., 316).

As the commitment was issued it fully complied with all that the settled practice of the courts has at any time required on this subject (*People* agt. *Nevins*, 1 Hill, 154; *Shank's case*, 15 Abb. [N. S.], 39).

It is not very important to consider whether the proceeding is under the Code or the Revised Statutes. For in either case the right to imprison the defendant for the violation of the injunction has been secured (3 *Rev. Stat.* [6th ed.], 856, sec. 1, subs. 3, 8). For the injunction was a lawful mandate as that has been defined by subdivision 2, section 3343 of the Code.

The order from which the appeal has been taken seems to have been well warranted, and it should be affirmed, with the usual costs and disbursements.

DAVIS, P. J., and BRADY, J., concur.

SUPREME COURT.

FREDERICK TAYLOR agt. JOHN B. THOMPSON.

Corporations — Responsibility of trustees — Their liability to creditors for filing a false return — Sufficiency of complaint in action against trustee.

Where a creditor of a corporation seeks to charge a trustee personally with a debt, upon the ground that in pursuance of the eighteenth section of chapter 611 of the Laws of 1875 he signed and caused to be filed an annual report which, as the complaint alleged, was false in a material representation — viz., that the whole of the capital stock of \$700,000 had been paid in full, when in fact it was issued in exchange for an interest in real property not exceeding \$200,000 — it is not necessary to aver that the transaction was a fraudulent cover for a fictitious payment of the stock, or that the trustee acted with no actual belief in the

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value of the land, or no reasonable ground or basis for such belief, and that the issue of the stock for the land was done with the fraudulent purpose of evading the statute, when it is alleged the defendant knew the report to be false when he signed it.

DEMURRER to complaint.

Lewis Sanders, for demurrer.

Stuart & Boardman, opposed.

VAN VORST, J. — Portions of the complaint are open to the criticism made by the learned counsel for the defendant. The report, signed by the defendant and the other trustees, is annexed to the complaint and is made a part thereof, and the report must speak for itself as to the payment of the capital stock of the corporation, and how and in what paid.

Some of the allegations of the complaint, in respect to the payment of the capital stock, are conclusions of the pleader rather than a statement of facts, as shown by the report itself; but, still, I am of opinion that the complaint discloses a cause of action.

The corporation of which the defendant was a trustee was organized under chapter 611 of the Laws of 1875, entitled "An act to provide for the organization and regulation of certain business corporations." The plaintiff is a creditor of the corporation, and the defendant is sought to be charged personally with the debt upon the ground that, in pursuance of the eighteenth section of the act in question, he signed and caused to be filed an annual report, which report, as the complaint alleges, "was false in a material representation." The complaint, in substance, limits the falseness of the report to its statements in regard to the payment of the capital stock. The report says that the capital stock of the corporation is \$700,000, and that the whole thereof "has been paid in full."

Section 14 of the act in question forbids the issuing of stock, "except for money, labor done or property actually received" for the use and legitimate purposes of the corpora-

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tion, "at its fair value." How the stock in question was issued, and whether for money or property, the report is silent. It does, however, state that it "has been paid in full." In the end the complaint alleges that the whole of the capital stock was issued to Henry Y. Attrill in exchange for his interest in certain real property, with the improvements thereon, "and that at the time when said exchange was made" the fair value of the interest of said Attrill in said real property, including his interest in all improvements thereon, did not exceed the sum of \$200,000, and that the defendant, "when he signed and verified the report, and caused the same to be filed, knew that the same was false as above stated."

Section 21 of the act in question declares that if any report made by the officers of such corporation shall be false in any material representation, the officers who shall have signed the same shall be jointly and severally liable for all debts of the corporation contracted while they are officers thereof.

A report made by the officers of a corporation, under the law in question, with respect to the capital stock, and whether paid in full, is clearly material, and any false statement in respect thereto would render the person making the same liable to creditors.

By demurring to the complaint the defendant concedes the truthfulness of the allegations of the complaint, that the value of the property for which the stock was issued did not exceed, at the time of the transaction, \$200,000. How could he then, in good faith, make and sign an annual report in which it was stated that the capital stock of \$700,000 had been paid in full? The mere fact that it turned out after the report was made that the property for which the stock had been issued was not worth the amount at which it had been originally valued and taken, would not expose the defendant to the charge of making and verifying a false statement, or to liability therefor. If he acted honestly and in good faith in making the statement, believing it to be true, that

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would exonerate him from liability. *The Lake Superior Iron Company* agt. *Drexel* (90 *N. Y.*, 87), was an action against a stockholder not a trustee. But the complaint alleges that the plaintiff, when he signed and verified the report, "knew that the same was false as above stated." That means that he knew, when he signed the report, that the property, when received, was not in fact worth to exceed \$200,000. The liability of the defendant in this action turns upon the question exclusively as to whether he knowingly signed a report which was false in a material representation.

The learned counsel for the defendant insists, however, that the complaint is defective in substance, in that it does not aver that the transaction "was a fraudulent cover for a fictitious payment of the stock," or that "the trustees had no actual belief in the value of the land, or no reasonable ground of basis for such belief," and that the issue of the stock for the land was done "with the fraudulent purpose of evading the statute."

It may very well be that the good faith and honesty of the transaction between the company and Attrill and the trustees who took part in issuing the stock and receiving the land in payment, may constitute a fair and appropriate subject for inquiry on the trial of an issue of fact in this action. But I cannot say that such allegations are necessary in a complaint in an action brought under section 21 of the law in question.

In *Pier* agt. *Hunmore* (86 *N. Y.*, 95, 104, 105), it is said: "Where the report is false in a material point, and plainly proven to have been known so to be to the officer signing it, it can hardly be necessary to prove the purpose for which the misrepresentation was made, or that any particular fraud was intended, as if a trustee should knowingly state that a larger amount of capital had been paid in than had in fact been paid," &c.

As has been already stated, the complaint alleges that the defendant knew the report to be false when he signed it. That is enough to uphold the pleading, and everything else

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necessary is implied in the statement. It is clearly enough to put the defendant to his answer on the merits. But, as was said in *Stebbins* agt. *Edmonds* (12 *Gray*, 203), in order to justify a recovery, if the allegation be denied, it must be made to appear on the trial "that it was willfully false, that is, made intentionally with a purpose to deceive, and that the scienter or guilty knowledge must be equivalent to *mala fides* in making the certificate."

The demurrer cannot, therefore, be sustained, but the defendant has leave to withdraw the same and to answer, upon payment of costs.

N. Y. COMMON PLEAS.

In Matter of the Assignment of F. MAYER & Co.

Assignee — What amounts to misconduct and calls for his removal.

On October thirty-first, the assignee drew out of the moneys of the estate deposited in the Central National Bank \$8,000, and on November fifth, he drew the further sum of \$7,000. Both these drafts were entered on the cash book of the assignee on the last mentioned day. On November ninth, one of the attorneys for the parties making this motion for the removal of the assignee, saw these entries and asked to see the assignee's check book. The assignee refused to show the check book, and said that his official check book was his private affair. His attention being called to the fact that these entries had challenged inquiry, he thought it best, for some reason that does not appear, to cause the words "special deposit" to be added to the entries.

Held, first, that the assignee's refusal to show the check book was improper and contrary to the rules of this court.

Second. He erred in saying that his official check book was his private affair. When an assignee voluntarily assumes the position of a trustee for others, his action respecting property in which they are interested, is in no sense his private affair.

Third. An assignee, without criminal intent, may, from pure good nature, lend to a necessitous friend, without security, the money of the assigned estate; but if he does so he violates his duty and becomes liable to removal. The law will not tolerate any action, however benevolent

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may be the motive that prompted it, which turns the trust fund from the use to which the creation of the trust directed its application.

Fourth. The conduct of the assignee, in concealing from the creditors the purpose for which the money was drawn, and in withholding from the court evidence that he undoubtedly possesses, as to the times at which he deposited the money, though he promised to produce the evidence, amounts to misconduct within the meaning of the assignment act, and calls for his removal.

Special Term, December, 1883.

Blumenstiel & Hirsch, for petitioners, for motion.

Richard S. Newcombe, for assignee, opposed.

VAN HOOSEN, *J.*—Most of the grounds assigned for the removal of the assignee are unsubstantial. Whatever may be the true construction of section five of the assignment act, it would be absurd to hold the assignee responsible for the act of the court in prematurely ordering him to file a provisional bond. I do not say that the time for the filing of a provisional bond had not arrived when the order for the filing of it was made; but I do say that, conceding such to be the fact, the assignee should not be made the scapegoat for the errors of the court. Again, the charge that the assignee has paid some preferred debts before the attorneys for the moving parties have succeeded in obtaining any evidence to show the assignment to be fraudulent, is not entitled to serious notice. The assignee deserves praise instead of censure for having proceeded without delay to execute his trust and pay the preferred debts. I should not hesitate for a moment to remove an assignee who, instead of performing his duty, delayed the execution of his trust and the payment of preferred creditors for the purpose of enabling non-preferred creditors to hunt for evidence that the assignment was fraudulent. Nor is any fault to be found with the assignee for taking the assignment for his chart and compass and paying the debts in the order therein set down. If some of the preferred debts are not matured, it is nevertheless his duty to pay them, making the

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necessary deduction of interest. It is his duty to carry the assignment into effect as well as to defend its validity. If any creditor believes that the assignment is fraudulent in fact, or fraudulent because it conflicts with the law, he must take proceedings to have it set aside; and if he does not take such proceedings he has no right to ask that the assignee delay, even for an hour, the performance of what the assignment requires him to do.

Without discussing all the accusations made against the assignee, I shall proceed to consider one charge that seems to me to be very serious. I say here that I do not believe that the assignee intended to misappropriate a dollar of the estate. It is proved that he is a merchant who bears an unblemished reputation and enjoys the confidence of many estimable men. I think he has made a serious mistake, however, in one matter, and I regret that he has not thought it best to be frank with the court with respect to it.

It appears that on October thirty-one the assignee drew out of the moneys of the estate deposited in the Central National Bank \$8,000, and that on November five he drew the further sum of \$7,000. Both these drafts were entered on the cash book of the assignee on the last mentioned day. On November nine, one of the attorneys for the parties making this motion saw these entries and asked to see the assignee's check book. The assignee refused to show the check book. This refusal was improper, for the rules of this court expressly provide (*Rule 19*) that "the assignee shall keep full, true, exact and regular books of account of all receipts, payments and expenditures of money by him, which said books shall always, during business hours, be open to the inspection of any person interested in the trust estate." The assignee said that his official check book was his private affair. In this he erred. He had voluntarily assumed the position of a trustee for others, and his action respecting property in which they were interested was in no sense his private affair. But his attention was called to the fact that these entries had challenged

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inquiries, and then he thought it best, for some reason that does not appear, to cause the words "special deposits" to be added to the entries. Why those words were not written at the time the entries were made, and why they were inserted after inquiries had been made as to the purpose for which the money had been drawn from the bank, no explanation has been given.

The assignee, does, however, give an explanation of the circumstances under which the money was taken by him. He says that the money was drawing no interest, and that for the purpose of getting interest upon it he placed it on deposit with Charles Minzesheimer & Co., who agreed to pay interest at the rate of four per cent, and who pledged with him three per cent government bonds as collateral security for the loan. As proof that such a transaction took place, he produces two receipts from Charles Minzesheimer, the dates of which correspond with the dates of the entries in the cash book to which I have referred. The presumption is, of course, that these receipts were given at the times at which they are dated, and perhaps it was because of this presumption that the assignee does not state in his affidavit that he made a special deposit of \$8,000 with Minzesheimer on the thirty-first of October, or that he made a special deposit of \$7,000 on the fifth of November. Mr. Minzesheimer, in his affidavit, is silent as to the times at which these "special deposits," as they are called, were made. He says that the assignee placed in his hands \$15,000 of the money of the assigned estate, but he does not say when this was done. This being the state of affairs appearing by the affidavits at the time, the motion for the removal of the assignee was argued. The counsel who appeared in support of the motion called attention to the fact that there was no distinct assertion that the special deposits had been made before notice of motion for the assignee's removal was served, and that it was essential to the completeness of the assignee's explanation that he should show that the so-called special deposits were not an

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after thought, but were actually made at the date of the receipts. To this the counsel for the assignee assented, and he said that he would produce Mr. Minzesheimer's affidavit to prove that the deposits were made—the first on the thirty-first of October and the second on the fifth of November. I have waited for several days in expectation of receiving an affidavit, if not from Minzesheimer, at least from the assignee, that the deposits were actually made at the times the receipts bore date. No such affidavit has been furnished, and the question for me now to determine is whether, in view of the fact that I do not believe the estate to be in danger of losing the \$15,000, and in view of the fact that many of the largest creditors are desirous that the assignee should be retained, I should hold that, as the charge is really one of misappropriating money, the burden of proof is on the moving party, and that (though the assignees's explanation is not satisfactory) the evidence offered against him is insufficient to establish the charge, or whether I should hold that the circumstances proved by the petitioners created so strong a probability of the assignee's misconduct as to require a full explanation of his use of the money, and that as he had it in his power to prove, by his own oath, that the deposits were made at the times of the dates of the receipts, his failure to produce such proof warrants the strongest inference against him, and justifies the conclusion that the receipts of Minzesheimer are only fabricated evidence, designed to conceal the truth as to the use made of the \$15,000. Strong presumptions arise from the suppression as well as from the fabrication of evidence.

What inference is fairly to be drawn from the fact that the assignee refused to show his check book, which must have contained entries relating to the withdrawal from the bank of these two sums, \$8,000 and \$7,000? Why was the cash book afterwards changed by the inserting of the words "special deposit?" Why is not the affidavit of the assignee produced when he is informed that it is of the highest importance that he should show that the money was actually deposited with

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Minzesheimer at the dates of the receipts. Why has he not explained his inability to procure the affidavit of Minzesheimer? What inference is to be drawn from the fact the assignee, when challenged to produce proof that the special deposits were made at the dates of the receipts, voluntarily undertakes to furnish such proof (which, if it exists, must necessarily be in his own hands), and then fails to produce it? The answer seems to be that the assignee has made such use of the money that he cannot disclose the purpose to which it was applied. I say again, that I do not believe that he took it for his own benefit, or that he has not replaced it, or that the estate will lose it. An assignee, without criminal intent, may, from pure good nature, lend to a necessitous friend, without security, the money of the assigned estate; but if he does so he violates his duty, and becomes liable to removal. It may very well be that the assignee has not, but that others have, had the benefit of these two sums; but the law will not tolerate any action, however benevolent may be the motive that prompted it, which turns the trust fund from the use to which the creator of the trust directed its application.

I think I am bound to decide that the conduct of the assignee in concealing from the creditors the purpose for which the money was drawn, and in withholding from the court evidence that he undoubtedly possesses as to the times at which he deposited the money, though he promised to produce the evidence, amounts to misconduct within the meaning of the assignment act, and calls for his removal.

An order may be entered, therefore, for the removal of the assignee, and for the appointment of Emanuel B. Hart as substituted assignee in his room; that the assignee, Simon Danzig, upon the service upon him of a copy of the order, deliver and surrender to Emanuel B. Hart, the substituted assignee, all and singular the property which has come into his possession or under his control by virtue of the assignment; that said Danzig account before Frank A. Ransom, who is appointed referee to take and state the accounts of said

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Danzig; that the substituted assignee, before entering upon the discharge of his duties, give a bond in the sum of \$5,000,000 for the faithful discharge of his duties.

SUPREME COURT.

GEORGE B. SMITH agt. ISAAC W. CRISSEY, as Comptroller of the City of Troy.

Parties — Who may and should be made parties — Code of Civil Procedure, sections 447, 448.

An action which seeks to enjoin payment of money to individuals, cannot be maintained without making them parties to it.

He who is deprived of his property, or of what he claims to be his, is entitled to be heard, and no judgment can be rendered depriving him of that which he claims to be his, without bringing him before the court, which is asked to determine his rights.

Albany Special Term, February, 1883.

MOTION by defendant to dissolve an injunction.

R. A. Parmenter, for defendant and motion.

Merritt & Ryan, for plaintiff and opposed.

WESTBROOK, J. — The injunction, which this motion seeks to vacate, restrains the defendant, as comptroller of the city of Troy, "from countersigning any draft or drafts drawn by Michael Cavanaugh and Edward Hannan, for the payment of any police force in said city over which John McKenna claims to be superintendent, or from countersigning any draft or drafts for the payment of any police force, which are not drawn by a majority of the board of police commissioners;" and the complaint in the action demands a judgment awarding

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a permanent injunction of a like character, "and for the costs of this action."

When this action was commenced, and when the motion to dissolve the injunction was argued and submitted, there were in the city of Troy two police forces, each claiming to be the legal force of the city. The object of the action was to restrain the payment for services to the members of one force, and to procure a permanent judgment therein declaring that such force was not legal, and that no member thereof should ever obtain compensation for his services. In other words, without giving the parties who were to be affected by the relief sought an opportunity to be heard, this court was asked temporarily and permanently to enjoin the payment to them and each of them of moneys, which each and all claimed to be legally due. It is true that since the submission of this motion the court of appeals, in *People ex rel. Woods agt. Crissey* (91 N. Y., 616), has settled the question between the two forces, and determined it against the one which the plaintiff in this suit claims to be illegal, but that decision does not dispose of one question, which both this motion and suit present, and that is: Can an action, which seeks to enjoin payment of money to individuals be maintained without making them parties to it?

The answer to the question propounded does not seem to be difficult. He who is deprived of his property, or of what he claims to be his, is entitled to be heard, and no judgment can be rendered depriving him of that which he claims to be his, without bringing him before the court which is asked to determine his rights. The Code (*sec. 447*) has accordingly provided: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant for the complete determination or settlement of a question involved therein." And when the parties are too numerous to be all united it has (*sec. 448*) further declared: "One or more may sue or defend for the benefit of all."

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It is apparent, if the relief asked by the complaint in this action be granted, that many individuals will be deprived of what they claim to be their property without having their day in court. The comptroller of the city of Troy, who is the sole defendant in the action, has no interest whatever in the result. If the judgment demanded by the plaintiff be rendered he sustains no loss, but it will fall upon others who have not been brought before the court and have never been heard in the assertion of their supposed rights. Such a result would be a reproach to the administration of justice, and the maintenance of the legal principles leading to it would be most disastrous in its consequences.

It is argued, however, that the act of 1881 allows a taxpayer to bring an action against a public officer to prevent the waste of funds or property belonging to a municipal corporation, and that therefore this action, which seeks to prevent the payment of that which is not due, is maintainable. It is true that the act referred to justifies the action as against the comptroller, but it has not declared that to obtain the entire relief such officer is the only necessary party. There are cases in which the officer may be the only necessary party; but in this, which seeks to adjudge and declare illegal and unjust claims held by numerous individuals against the city of Troy, the persons holding such claims, or some representatives of them, as required by section 448 of the Code, are necessary parties.

There are other objections to the maintenance of this injunction and action (*see opinion in Tappen agt. Same defendant, also Morris agt. Whelan, 64 How., 109*), but they will not be considered. It seems to me to be a clear legal impossibility to decide and adjudge that persons holding claims against another can by a direct judgment be deprived of them without their being brought before the court. It is true that in an action between some individuals a court in deciding matters which affect them may establish principles and decide questions which affect others also; but neither this court nor

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any court can legally decide that an action, which has for its direct object the forfeiture of the property or rights of an individual, is maintainable without bringing before it as a party the individual at whom and at whose right and property such action is directly aimed. This action is one of the character just described. The judgment asked directly and sharply, and not incidentally or collaterally, will affect, if rendered, persons not before the court; and before it can be granted or the injunction maintained such persons must be made parties, or at least some of them (if they be very numerous), as required by section 448 of the Code.

The motion to dissolve the injunction must be granted. The order to be entered in consequence of the decision of the court of appeals, to which allusion has been made, will probably be of no practical effect, as the defendant in his official action will doubtless conform himself to it and to its results. The fact, however, that the plaintiff is right in his allegations as to which is the legal police force of the city of Troy will not justify this court in maintaining an injunction or rendering a judgment against persons not parties to the action, and over whom it has no jurisdiction, because they have not been legally required to appear in the assertion of their rights.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE KNICKERBOCKER LIFE INSURANCE COMPANY.

Title — Inchoate dower right — When not satisfied or extinguished or barred.

Where a wife does not join with her husband in a mortgage upon realty and is not made party to the foreclosure of such mortgage, she has an inchoate right of dower in said premises after sale upon the foreclosure judgment, although, after the filing of the *lis pendens* in the foreclosure action and before the entry of the judgment, a deed from the husband to A. of said premises, purporting to have been made three years pre-

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viously and taken subject to the mortgage, was recorded in the same office, and that thereafter, and before the entry of judgment, a deed of said premises from A. to the wife, subject to said mortgage, was also recorded in the same office; and the purchaser at the foreclosure sale cannot be required to complete his purchase, the title not being good.

New York Chambers, October, 1883.

Edward H. Hobbs, for receiver.

S. M. & D. E. Meeker, for purchaser John M. Young.

POTTER, J.—This is a motion for an order compelling John M. Young, the purchaser, to complete his purchase of a house and lot No. 774½ Monroe street, in the city of Brooklyn. The facts are briefly these: That the receiver of the plaintiff, which was a corporation and was dissolved by the judgment of this court December 29, 1882, sold at public auction as the property of such corporation, the above mentioned property for the sum of \$2,925, to John M. Young. The title of the plaintiff thus sold, was derived under the foreclosure of a mortgage executed on the 21st day of January, 1872, by squire S. P. GREEN, the then owner, to Jane B. Hyde, who assigned the same to the plaintiff; and the plaintiff assigned the same to John A. Nichols, who obtained a judgment of foreclosure in an action against said Green (who still owned the same, as far as the records in the proper office showed) and others, and the judgment, after the filing of notice of *lis pendens*, was duly obtained; that at the time of the execution of the mortgage said Green was the husband of Susan B. Green, who did not join with him in the execution of said mortgage and was not a party to the action to foreclose the same, and is still living; that after the filing of the said notice of pendency of action, and before the entry of the said judgment, and on the 2d day of January, 1875, a deed from the said squire Green to Martin L. Bush, of said premises, and purporting to have been made on the 3d day of December, 1872, was recorded in the same office, said conveyance being

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made and taken subject to said mortgage; that thereafter and before the entry of said judgment, viz., the 2d day of February, 1876, a deed of said premises from the said Bush and his wife to said Susan E. Green, wife of the mortgagor, purporting to having been made on the 20th day of January, 1875, was recorded in said office, and purported to be made and taken subject to said mortgage; that after said property had been sold under the judgment of foreclosure, it was conveyed to the plaintiff; that the plaintiff, through the receiver, tendered a deed of said premises to said Young, who refused to complete the purchase, alleging that the title was not good, for the reason that Susan E. Green, wife of said mortgagor, was not a party to said foreclosure action, and that she still had a dower right in said premises.

The ground of the purchaser's refusal to complete the purchase is that Mrs. Susan E. Green has an inchoate right of dower in said premises. That is the only objection made to the title, and of course is the only question for consideration upon this application. There is no question that she at one time had such right of dower. How has such right been satisfied or extinguished or barred? Not by the judgment in the action to foreclose the mortgage under which the plaintiffs obtained title, for she was not made a party to that action. It is contended that her inchoate right of dower in the premises was merged in the fee which she obtained under the deeds from Green to Bush, and from Bush to Mrs. Green, recorded during the pendency of the action to foreclose, and subsequent to the filing of a notice of *lis pendens* therein. I do not think it can be successfully maintained in this case that there has been a merger of Mrs. Green's inchoate right of dower into the estate which she took under the deed to her from Bush. The right of dower is favored in the law, and is incapable of being defeated or disposed of without the consent of the doweress; and during the life of her husband she can only consent to a release of such right in one way, and that is by joining with him in a conveyance to a third

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person (*In re Sipperly*, 44 *Ber.*, 370; *Malloney* agt. *Horan*, 49 *N. Y.*, 111); and in such case it is but the release of a future contingent estate, and only operates against her by way of estoppel (*Id.*). Hence, it has been held, that if the conveyance in which the wife joins with her husband and thus releases her dower, is canceled, or is void, or is set aside as fraudulent as against the creditors of her husband, the release of dower does not, after that, operate against the wife, and she is again clothed with the right which she had released (*Malloney* agt. *Horan*, *supra*). This being the only mode in which the inchoate right of dower may be disposed of, I should not be willing to hold, upon a simple motion, that a right, so favored and humane, may be released and sold with her husband's equity of redemption, upon the theory that the right of dower has become merged in the husband's equity of redemption, and so subject to be sold under a mortgage which the wife did not sign with him. Assuming, for the sake of plaintiff's theory, that the inchoate right of dower is an estate which may be merged in a present legal estate, it has been held that there is no merger in respect to strangers (third persons or creditors of the husband) where husband and wife joined in a deed to a third person, and he conveyed to the wife in fraud of the husband's creditors (*Lowry* agt. *Smith*, 9 *Hun*, 514; *Malloney* agt. *Horan*, *supra*).

In these cases the wife accepted the deed. But in the case under consideration there is no evidence that the wife accepted the deed or was aware of its existence. The absence of such acceptance or knowledge of the deed is perhaps confirmed, or at least made more marked, from the fact that she did not unite with her husband in the mortgage under which plaintiff claims title, nor in the deed which her husband executed to Bush of his equity of redemption. If she had intended to release her right of dower she could have done so very directly and effectually, and shown her design to do so by joining in the mortgage and deed executed by her husband.

Whether or not there is a merger, in many cases depends

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upon the intention and the interest of the parties in whom the estate may merge (*White* agt. *Leslie*, 54 *How.*, 394; *Judd* agt. *Seekins*, 62 *N. Y.*, 266). Clearly, no such intention can be inferred from the papers used upon this motion, which plainly show that it would be against her interest to allow that a merger should take place, and where she is not shown to have any knowledge of a deed which might work a merger. I am, therefore, decidedly of the opinion that there was no merger in this case, and Mrs. Green is still entitled to inchoate right of dower in the premises struck off to the respondent.

But if the case presented simply raised a doubt in regard to the title of plaintiff under the decisions in *Jordan* agt. *Poillon* (77 *N. Y.*, 518); *Fryss* agt. *Rockefeller* (63 *N. Y.*, 268), the respondent should not be compelled to complete the purchase in this case. He had a right, in the absence of some prior notice of defect, in a judicial sale, to expect a good title, and he will not be compelled to accept a deed which leaves him to the uncertainty of a doubtful title, or the hazard of a probable contest and litigation in regard to his title.

The motion should be denied, with costs.

SUPREME COURT.

GEORGE THORNTON agt. CHLOE C. THORNTON.

Referee — Report to be filed within sixty days after submission — Code of Civil Procedure, section 1019 — what is a sufficient compliance with this section to prevent termination of reference.

Where a referee has made his report within the statutory time and on the fifty-ninth day after submission of the cause, notifies the plaintiff's or defendant's attorneys that his report is ready and at their disposal, and also notifies them of the amount of his fees, it should be deemed a sufficient delivery to prevent the forfeiture of his fees or the termination of the reference under section 1019 of the Code of Civil Procedure.

Special Term, August, 1883.

Thornton agt. Thornton.

MOTION by defendant for judgment on the report of a referee, to hear and determine a contested divorce case, under section 1229 of the Code of Civil Procedure. The motion was opposed only on the ground that the referee's report had been filed more than sixty days after the submission of the cause and after plaintiff had given notice of his election to end the reference. On the fifty-ninth day, however, the referee had addressed to the plaintiff's attorneys the following letter, which he claimed to be a constructive delivery within the meaning of section 1019 of the Code of Civil Procedure:

"DEAR SIR.—The referee's report, in the suit of *Thornton* agt. *Thornton*, is ready and at your disposal. Referee's fees are one hundred dollars.

"Yours respectfully,

"HENRY ALKER."

Edward B. Whitney, for motion.

Sidney H. Stuart, opposed, relied upon *Phipps* agt. *Carman* (23 Hun, 150; 84 N. Y., 650).

HIGHT, J.—I am of the opinion that I should grant the motion and order judgment for the defendant, dismissing the plaintiff's complaint, with costs. In so doing I follow *Quackebush* agt. *Johnson* (55 How. Pr., 94); *Cornelius* agt. *Barton* (12 W. Dig., 216); *Geib* agt. *Topping* (83 N. Y., 46). I am aware that *Phipps* agt. *Carman* (23 Hun, 150) is in conflict with the cases relied upon, and that this case has been affirmed in 84 N. Y. I am, however, unable to concur in the opinion written in the general term, and, inasmuch as the general term of another department has since held the other way, I do not feel bound by it. The court of appeals, it is true, affirmed the decision, but did not state the grounds upon which its decision was based. In that case there was a delay of about two years in filing the referee's report, and the case is easily distinguishable from the one under consideration.

Motion granted.

Robinson agt. Attrill.

SUPREME COURT.

ANDREW J. ROBINSON and another agt. HENRY Y. ATTRILL
and others.

Corporation — Liability of directors — Sufficiency of complaint in action by creditors of a corporation against directors, to hold them personally liable because the debts of the corporation exceed the amount of its capital stock — Laws of 1875, chapter 611, section 22.

In an action by the creditors of a corporation against the directors thereof to hold them personally liable, because the debts of the corporation created by defendants exceed the amount of its capital stock, it is enough to state the amount of such capital and to give the amounts of the claims which are outstanding, and it is not necessary that the debts should be due. If an apparent claim is not real, the fact should be set up by answer.

Special Term, November, 1883.

DEMURRER to complaint.

Lewis Sanders, for demurrer.

Edward S. Clinch, opposed.

VAN VORST, *J.*—This is an action in favor of the plaintiffs, as creditors of the Rockaway Beach Improvement Company (limited), against the defendants as directors thereof. The corporation was organized under chapter 611 of the Laws of 1875. Section 22 of the act under which this action is brought provides that “if the indebtedness of any such corporation shall at any time exceed the amount of its capital stock, the directors of such corporation creating such indebtedness shall be personally and individually liable for such excess to the creditors of such corporation.”

The complaint alleges that the amount of the capital fixed by the corporation is \$700,000, and that its indebtedness,

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created by the defendants as directors, exceeds \$1,795,000. The defendants demur to the complaint. In support of the demurrer it is argued that the complaint fails to make out an excess of indebtedness over the capital stock. It is claimed, on the behalf of the defendants, that the general allegation in the complaint that the indebtedness of the corporation created by all the defendants, as directors, exceeded the capital stock by a specific sum, is immediately followed and qualified by specification, and that the specification fails to show an excess of corporate debts over the amount of the capital stock, and that the debts are not in fact corporate debts, upon which the corporation would be held.

The first item of indebtedness stated in the complaint, after that in favor of the plaintiff, is alleged to have arisen upon a bond for \$72,000, made by Attrill, one of the directors, for the purpose of securing to L. & H. Littlejohn the payment of that sum, the payment of which was assumed by the corporation. It is objected to this specification that no consideration for such assumption by the corporation is alleged. Such consideration is not necessary to be stated in the complaint in an action of this nature. Creditors of a corporation cannot be supposed to know the consideration received by the corporation for the obligations it has assumed in favor of others. It is enough for the purposes of this pleading to give the amount of the claims which are outstanding.

It is alleged that this obligation has been assumed by the corporation, and the implication is that the assumption was based upon a valid consideration and that the debt is real. It is not necessary that the several claims should be stated with all the particularity required in an action founded upon either of them against the corporation itself. If the apparent claim is not real, the fact should be set up by answer.

But the defendant's objection to the next item, as set up in the complaint, I think is well taken. The allegation is as follows: "Seven hundred bonds of said corporation, each of the denomination of \$1,000, with interest thereon from the

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first day of April, 1880, all of the principal and interest on such bonds being unpaid." The pleading fails to show that these bonds, or either of them, have been issued by the corporation or have reached the hands of creditors. For all that appears they may still be in the treasury of the company, unissued.

The other items of the indebtedness making up the sum total above mentioned, are severally sufficiently stated for the purposes of this action, and in amount considerably exceed the capital stock. The objection that some of the debts are not due cannot avail the defendants on this demurrer. Although not due, they are still debts, for the payment of which the corporation is liable. *Jones agt. Barlow* (62 *N. Y.*, 202), cited by the learned counsel for the defendants, is not in point. That case would apply if the claim in plaintiff's favor, upon which this action is brought, was not due, as a director could not be made liable for the payment of a claim against the corporation which had not matured.

Nor is the objection that some of the items of indebtedness were created in favor of the directors, or some of them, well taken; they are still debts, within the meaning of the statute.

The allegation or statements in the complaint by which the corporation is described as "limited," I regard as sufficient.

None of the objections are sufficient to sustain the demurrer, and it must be overruled, with liberty to the defendants to answer on payment of costs.

Hull agt. Allen.

N. Y. COMMON PLEAS.

AMOS G. HULL agt. JAMES M. ALLEN.

Reference — When compulsory reference will not be ordered in an action by an attorney for services.

Where, in an action by an attorney for services germane to one subject of litigation and rendered under one retainer, although the specific acts were numerous, no issue is made upon the rendition of the services, but only upon their value, the trial will not require the examination of a long account so as to call for a compulsory reference.

At Chambers, November, 1883.

THIS action was brought to recover \$13,214.87, a balance claimed for services rendered to the defendant, *In the Matter of the Estate of John Hancock*, and suits growing therefrom. The services commenced in 1874 and ended in the spring of 1883.

The answer admitted the services, but charged exorbitancy in charges; set up that they were rendered to defendant solely as executor; that the surrogate had made an award, and that the plaintiff had agreed to abide by the amount of award when he first connected himself with the case and payment of \$8,800. The bill of particulars was twenty-eight pages long and was made up largely of entries from the register of plaintiff.

A motion was made for a reference by plaintiff, and upon such motion the following decision was rendered:

Andrew Lemon and Joseph Fettretch, for defendant.

Amos G. Hull, plaintiff in person; also *Childs & Hull*, attorneys for plaintiff.

BEACH, J. — There is a question concerning the agreement between the parties for the plaintiff's professional services materially affecting the right of recovery. This should be

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submitted to a jury, unless the items of plaintiff's account are so numerous and of such a character as to render it unlikely that a jury could carry them in mind with the accuracy required for intelligent consideration and a just conclusion. The labors of the attorney were germane to one subject of litigation and rendered under one retainer, although his specific acts during a persistent and lengthy contention were numerous, still it by no means follows that each and everyone must be shown with its value. This is not indicated by the bill of particulars, where but one sum is affixed to all the items. There seems to be no issue made upon the rendition of the services, but only upon their value, being the amount in gross demanded by the plaintiff.

The trial, in my opinion, will not require the examination of a long account so as to call for a compulsory reference (*Dittenhoefer agt. Lewis*, 5 *Daly*, 72; *Felt agt. Tiffany*, 11 *Hun*, 62, and cases cited).

Motion denied.

N. Y. SUPERIOR COURT.

EDWARD A. EMERSON agt. CLARENCE M. ROOF.

Real estate — When time not the essence of the contract — Specific performance — When plaintiff entitled to perform — When no right of action arises for commissions paid by plaintiff.

The plaintiff, in April, 1883, through his agent and attorney, entered into a contract with defendant to purchase of the latter two pieces of real estate for \$127,500, the purchaser to pay the broker's commissions, \$1,275, upon the sale. The broker through whom the sale was made, who was not expressly employed by defendant, had given plaintiff's agent, without the knowledge or authority of defendant, a diagram on which was stated the width of one of the premises, but the contract was executed for the sale of the property by street numbers, nothing being then stated about a diagram. On the day prior to the execution of the contract, plaintiff had contracted to sell the same premises for \$138,900, and paid \$1,389 for the broker's commissions on such sale.

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When, on the day fixed for closing the sale, defendant tendered a deed, it appeared that the width of one piece of property was four feet less than the dimensions shown upon the diagram, and plaintiff declined to accept the deed without a deduction for the deficiency, and sought by this action to recover the amount for brokers commissions paid by him, besides \$2,500 paid on execution of the contract.

Held, that plaintiff, there being no fraud or mutual mistake, was bound by the contract, and time not being of its essence, is still entitled to perform it according to its terms. If he fail to perform it, judgment should be for the defendant, as no right of action arises for the commissions, the \$1,275 being received as a condition precedent to the execution of the contract, and the \$1,380 having been paid in advance before plaintiff had any legal right to sell the property.

Special Term, December, 1883.

In the year 1879, Homer Morgan, a well known real estate broker, had the premises Nos. 34 Broadway and 69 New street for sale for James M. Motley, and subsequently for a Mr. Fielder. In the early part of 1883, Morgan had an offer for the property, and through his clerk Jabez B. Hyde, opened and conducted negotiations with the defendant (who was discovered to be the party in interest) for the sale of the premises.

As a result of these negotiations Du Bois Smith (the agent and attorney of the plaintiff) and the defendant had several interviews, and a final offer of \$127,500 net was agreed upon as the price to be paid for the property. This proposition, as explained by the evidence, meant that the purchaser was to pay the broker's commissions upon the sale. Hyde gave Smith a diagram upon which the premises No. 34 Broadway appeared as thirty-two feet one inch in width. The defendant never authorized Hyde to issue it, and had no knowledge of its existence until after the execution of the contract of sale. This contract, though dated April 20, 1883, at Smith's request, was executed on the following day for the sale of the premises, by street numbers, 34 Broadway and 69 New street.

On April 20, 1883, the plaintiff had contracted to sell the

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premises to George H. Morris for \$138,000, and paid \$1,380 for the broker's commissions on such sale.

On the day fixed for closing the sale between the parties to this action, the defendant tendered a deed of the premises in question, by which it appeared that the width of the Broadway property was about four feet less than the dimensions shown upon the diagram. The plaintiff declined to accept the deed unless a proportionate deduction was made for such deficiency. This offer was not accepted, and plaintiff having amended his complaint upon the trial, now seeks to recover the amounts paid by him on account of his purchase, viz., \$2,500 paid on execution of the contract, \$1,275 commissions paid to Morgan, and \$1,380 commissions paid to the broker upon the sale to Morris; in all, \$5,155.

Abram Wakeman, for plaintiff.

Alfred Roe, for defendant.

LARREMORE, J. — The premises were in Morgan's hands for sale for some years before the defendant acquired any interest therein. It was not until the spring of 1883 that Morgan, upon the application of a purchaser, sought out the defendant and opened a correspondence with him upon the subject. This correspondence and the interviews between the parties finally resulted in the execution of the contract upon which this suit is brought. It might be said, in view of the evidence, that Morgan was as much the agent of one party as the other in effecting the sale. He was not expressly employed by the defendant. He met the inquiry of a purchaser by finding the owner of the premises and bringing them together. They made a contract, and his mission was ended. But conceding, as was insisted upon the trial, that he represented the defendant, his agency at the most was special in character, and the plaintiff in dealing with him was chargeable with notice of his special authority. He had no authority from the defendant to issue a diagram showing the dimensions of the property.

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This was an act for which his alleged principal cannot be held responsible. But whatever representations may have been made, and even though the plaintiff was mistaken as to the dimensions of the property he purchased, yet in the absence of fraud or mutual mistake the contract of April 29, 1883, must control my decision. Before it was executed the plaintiff's agent, who was a lawyer by profession, requested that the dimensions should be inserted therein, to which the defendant replied that he did not know what the dimensions were except in a general way, and that he would sell "as 34 Broadway and 69 New street." Nothing was then said about a diagram. In this he is corroborated by the testimony of the attorney who drew the contract, while the testimony of the plaintiff and his attorney upon that point is purely negative in character. They do not recollect any such conversation.

Assuming, therefore, as the evidence warrants, that the plaintiff was bound by the contract, the question arises, is it still in force? Time was not originally of its essence, nor has it become so by subsequent notice (*Myers agt. De Mier*, 4 *Daly*, 343; *aff'd*, 52 *N. Y.*, 647). The plaintiff is still entitled to perform it according to its terms. It does not appear that the property has depreciated in value or that the defendant has sustained any loss by reason of its non-performance. He has received \$2,500, for which he has given no equivalent. It would be inequitable for him to retain it unless the plaintiff absolutely and unconditionally refuses to perform.

No right of action arises for the commissions paid by the plaintiff. The \$1,275 were received by Morgan as a condition precedent of the execution of the contract. The \$1,380 were paid in advance before the plaintiff had any legal right to sell the property to Morris.

Under all the circumstances, I think the plaintiff should have another opportunity to save his \$2,500, and if within twenty days after service of a copy of the judgment to be entered herein, he shall tender performance of the contract,

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the same shall be performed according to its terms, subject to adjustment for interest and moneys expended properly chargeable upon the property, which, if not agreed upon, may be settled by a reference for that purpose. If the plaintiff fails to perform as above stated, then judgment is ordered for the defendant.

SUPREME COURT.

WILLIAM W. RIDER agt. WILLIAM E. BATES and MALINDA BATES, his wife, HENRY FROST and HARRIET M. FROST, his wife.

Answer—Amendment once, of course, and this after notice of motion by plaintiff to strike out for irregularity in verification—Code of Civil Procedure, section 542—Costs.

In action brought against four defendants the answer was duly verified by one and was served September twelfth, and on September twenty-ninth plaintiff served notice of motion to strike out the answer of defendants as to the other three, and as to them to treat it as a nullity for the reason that they were not united in the verification. On October second, and within twenty days after the service of the first answer, the defendants served an amended and properly verified answer by all the defendants, who united in the verification thereto:

Held, that the service of the amended and properly verified answer is a perfect answer to this motion, and must defeat the same but without costs.

Held, also, that as the plaintiff was right in serving notice of motion, because the first answer was improperly verified, no costs should be allowed to defendants.

Kingston Special Term, October, 1883.

MOTION by plaintiff to strike out the answer of defendants as to the three last-named defendants, and as to them to treat it as a nullity for the reason that the said last three defendants have not united in the verification thereto, and in that only one of the defendants, viz., William E. Bates, made the

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verification, and there is no reason assigned why the other defendants do not unite in the verification.

The first answer was duly verified by William E. Bates and was served September 12, 1883, and on the twenty-ninth of same month the notice for this motion was served, and on the 2d day of October, 1883, and within twenty days after the service of the first answer, the defendants served an amended and properly verified answer by all the defendants, who united in the verification thereto.

Eugene Raymond, for plaintiff and motion.

Norman W. Faulk, for defendants, opposed.

WESTBROOK, *J.*—The defendants having within twenty days from the service of the first answer served an amended and properly verified answer, which they had the right to do as of course (*Code, sec. 542*), this motion must be denied, but without costs (*Welch agt. Preston, 58 How., 52, and many other cases*). As, however, the plaintiff was right in serving notice of motion, because the first answer was improperly verified, no costs of motion are given the defendants.

Motion denied, and no costs of this motion to either party.

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COURT OF APPEALS.

CHARLES T. PLYMPTON and another, respondents, agt. JOHN BIGELOW, appellant.

Attachment — Foreign corporation stock — Code of Civil Procedure, sec. 647 — This section authorizing the attachment of shares of the defendant in a corporation, does not apply to shares of stock of a foreign corporation.

Section 647 of the Code of Civil Procedure, authorizing the attachment of shares of the defendant in a corporation, does not apply to shares of stock in a foreign corporation.

The shares of a non-resident defendant in the stock of a foreign corporation cannot be deemed to be within this state, by reason of the fact that the president and other officers of the corporation are here engaged in carrying on a corporate business.

Decided November, 1883.

Sterns & Thompson, for appellants.

Battens & Lillienthal, for respondents.

ANDREWS, J.—This action is brought by the plaintiffs, residents of Massachusetts, against the defendant, a resident of Pennsylvania, upon several promissory notes of the defendant, made and delivered in Massachusetts and payable generally. The plaintiff procured an order for the service of the summons upon the defendant by publication, and also a warrant of attachment against his property. The sheriff of the city and county of New York, to whom the warrant was directed, undertook to execute it by levying upon 439 shares of the stock of the Hat Sweat Manufacturing Company, a Pennsylvania corporation incorporated under the laws of that state, owned by the defendant, and for which he held and then had, in the state of Pennsylvania, stock certificates issued and delivered to him at the office of the company in Philadelphia, in February, 1882, at which place the stock and transfer books of the company then were and still are kept. The sheriff, for the

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purpose of making the levy, left with the secretary of the company, in the city of New York, a certified copy of the warrant of attachment, together with the notice prescribed by section 649 of the Code of Civil Procedure. The formal proceedings were taken to complete the levy, and the shares were subjected to the attachment, provided they were liable to attachment under section 647 of the Code. That section declares that the "rights of shares which the defendant has in the stock of an association or corporation together with the interest and profits thereon, may be levied upon, and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had when they were attached."

The question here is whether this section applies to shares of stock of a foreign corporation. It is to be observed that the section is one of the provisions of a system of proceedings by attachment, and is to be construed in view of the fundamental principle upon which attachment proceedings rest, that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment in order to effect any valid or effectual seizure under the process. In the case of tangible property capable of actual manuecaption it must have an actual *situs* within the jurisdiction. But credits, choses in action, and other intangible interests are made by statute susceptible of seizure by attachment. The same principle, however, applies in this case as in the other, viz.: the *res*, that is, the intangible right or interest, to be subject to the attachment, must be within the jurisdiction. But it is manifest from the nature of this species of property that it must be a constructive or statutory presence only, founded upon some characteristic fact, which determines its locality. Where the defendant who owns a credit is within the jurisdiction there is no difficulty, through proceedings *in personam*, in reaching and applying it in discharge of his debt to the plaintiff. But where he is out of the jurisdiction, and the debt, or duty owing to him, or the right he possesses, exists

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against some person within the jurisdiction, attachment laws fasten upon that circumstance, and by notice to the debtor or person owing the duty or representing the right, impound the debt, duty or right, to answer the obligation which the attachment proceeding is instituted to enforce. In the case supposed, the debt, duty or right for the purpose of attachment proceedings, is deemed to have its *situs* or locality in the jurisdiction.

The general principle that attachment proceedings can be effectual only against property within the jurisdiction is clearly recognized in the provisions of the Code regulating proceedings by attachment. They authorize the attachment of debts, choses in action, rights by contract, and by section 647, shares of the defendant in a corporation, subject, however, to the limitation that the property attached must be within the jurisdiction. Section 641 prescribes that the warrant shall require the sheriff to attach the property of the defendant within his county, and by section 644 it is made the duty of the sheriff to execute the warrant by levying upon the property of the defendant within the county.

These provisions leave no doubt of the intention of the legislature to confine the process of attachment within its legitimate limits. They recognize the principle found in the Codes of all enlightened nations. That jurisdiction, to be rightfully exercised, must be founded upon the presence of the person or thing, in respect to which the jurisdiction is exerted within the territory (*Sto. Con. of Laws, secs. 532, 592 a*; *Gibbs agt. The Queen Ins. Co., 63 N. Y., 114*; *Street agt. Smith, 7 W. & S., 447*).

We now come more directly to the inquiry upon which the case now under review depends, viz. : whether the shares of a non-resident defendant in the stock of a foreign corporation can be deemed to be within this state by reason of the fact that the president or other officers of the corporation are here engaged in carrying on the corporate business. We do not overlook the fact that we are construing a section of the Code

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the language of which is sufficiently general to include foreign corporations, but they are not expressly named, and, for the purpose of determining whether foreign corporations were intended to be included, it is a relevant inquiry whether, upon general principles, the right which a stockholder in a corporation has by reason of his ownership of shares is a debt or duty of the corporation existing in a foreign jurisdiction wherever the officers of the corporation may be found engaged in the prosecution of the corporate business. If the corporation, by having its officers and by transacting business in a state other than its domicile of origin is deemed to be itself present as an entity in such foreign state, to the same extent and in the same sense as it is present in the state which created it, it may be conceded that its shares might be properly attached in such foreign jurisdiction. But we regard the principle to be too firmly settled by repeated adjudication of the federal and state courts to admit of further controversy, that a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction (*Bank of Augusta* agt. *Earle*, 13 *Pet.*, 519; *Lafayette Ins. Co.* agt. *French*, 18 *How.* [U. S.], 404; *Werrick* agt. *Van Santvoord*, 34 *N. Y.*, 208; *Stevens* agt. *Phoenix Ins. Co.*, 41 *id.*, 150).

But it is equally true that a foreign corporation is permitted to sue in the courts of this state, and that suits *in personam* may be brought against it by service of a process on its officers or agents within the jurisdiction (*Code*, sec. 432, p. 1780; *Gibbs* agt. *Queen Ins. Co.*, *supra*). But suits by or against foreign corporations are not maintained on the theory that the corporation litigant is here in person, or that the corporation entity attends its officers in their migration from one state to another, or that it is itself present wherever its property may be or its business may be transacted. The jurisdiction, as I understand, rests upon the ground that as a corporation must act by agents, it may, through its agents, subject itself to the jurisdiction of a foreign tribunal. This principle was clearly

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recognized by CURTIS, J., in *Lafayette Insurance Company* agt. *French* (*supra*), which was an action on a judgment obtained in the state of Ohio against an Indiana corporation by service of process on an agent of the corporation in the former state, and the point was taken that no jurisdiction was thereby acquired to render a judgment against the defendant. The court overruled the point, and judge CURTIS, after stating that the corporation in that case, existing duly by virtue of the law of Indiana, cannot be deemed to pass personally beyond the limits of that state, and that the actual presence in a state of a defendant, not in all cases essential to a judgment against him, said: "The inquiry is not whether the defendant was personally within the state, but whether he or anyone authorized to act for him in reference to the suit have notice and appeared, or if he did not appear whether he was bound to appear or suffer judgment by default."

Where a foreign corporation sends its agent into another state or transacts its business there, availing itself of the protection of the laws of such state, there is no just reason why it should not be deemed to have subjected itself through its agents to the jurisdiction of the courts of that state, and be held to respond to an action brought against it therein upon process served upon its representatives. This seems sufficiently plain, but it does not determine the present question. The proceedings authorized by section 647 of the Code is not an action against a foreign corporation, or to enforce any contract or liability of the corporation, but a proceeding in an action against a defendant owning shares therein, and where the jurisdiction depends upon the shares which are attached being within the state. The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate according to the amount of his stock in the surplus profits of the corporation, and ultimately on its dissolution in the assets remaining after payment of its debts (*Burrall* agt. *Bushwick Railroad Co.*, 75 *N. Y.*, 211). It is this right and interest which is made liable to attachment under the

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section referred to. The right of the shareholders is derived from the corporation under its charter of the laws of the state which created it. It is enforceable by judicial proceedings in the local courts, and in case of a dissolution of the corporation the local courts alone can be resorted to to wind up its affairs and distribute its assets. It seems impossible to regard the stock of a corporation as being present for the purpose of judicial proceedings, except at one of two places, viz., the place of residence of the owner or the place of residence of the corporation.

Section 647 has an appropriate application to shares in domestic corporations. Such corporations are completely subject to the jurisdiction of our courts, and may be compelled to recognize the title to corporate shares derived under proceedings by attachment. In respect to foreign corporations such power does not exist; and it could scarcely be expected that the courts of another state would recognize a title to corporate stock in one of its own corporations, founded upon a sale under an attachment issued by our courts against a non-resident, when the only semblance of jurisdiction over the property was the service of notice in the attachment of proceedings upon an officer or agent of the corporation here. The foreign corporation is not here because its agents are here, nor because it has property here; nor is the stock here because the corporation has property or is conducting its business in this state. The individual members of a corporation are not the owners of the property of the corporation, or of any part of it. The abstract entity, the corporation, is the owner, and only owner, of the property. We do not doubt that shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the state or county of its creation. In all other places it is an alien. It may send its agents abroad, or transact abroad as any other inhabitant may do, without passing personally into the foreign

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jurisdiction or changing its legal residence. But such agents are not the corporation, and do not represent the corporation in respect to rights, as between the corporation and its shareholders, incident to the ownership of shares.

It is not necessary in this case to define the limits of the legislative powers in subjecting intangible property to attachment by notice served upon such person or corporation as may be designated by the legislature. Manifestly the *res* cannot be within the jurisdiction as a mere consequence of the legislative declaration, when the actual locality is undeniably elsewhere; but in respect to intangible interests, as we have said, there can be no actual seizure of the things, and it can be bound only by notice to some one who represents the thing. In case of a debt, notice to the debtor residing within the jurisdiction is the ordinary proceeding to attach the debt, and if the debtor is a corporation, and the corporation is a domestic one, there is no difficulty. But in some of the states foreign corporations, having an agent or a place of business within the state, may be charged under what is called the trustee process or garnishee (*Barr* agt. *King*, 96 *Pa. St.*, 485; *National Bank* agt. *Huntington*, 129 *Mass.*, 444). In these proceedings the trustee or garnishee is joined with the principal defendant as a party to the action, and the debt owing by the trustee or garnishee is ascertained, and the liability of the trustee and garnishee is adjudged in the action. There may be no difficulty upon principle in compelling a corporation, which has an agent and officer in another state, and is transacting business there, to respond in garnishment proceedings for the debt, although the creditor, the principal defendant, is a non-resident, and is bound to respond. It is certainly just that the judgment which compels the corporation to pay the debt to the plaintiff should protect it in making such payment against a subsequent claim by its creditors. We do not enter into the question here. But whatever view may be taken as to the right to attach a debt owing by a foreign corporation to a non-resident by service of notice on an

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agent of the corporation within the jurisdiction, we think, in respect to corporate stock, which is not a debt of the corporation in any proper sense, it would be contrary to principle to hold that it can be reached by such a notice.

We are, therefore of opinion that the fundamental condition of attachment proceedings — that the *res* must be within the jurisdiction of the court in order to an effectual seizure — is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here, and that section 647 must be construed as applying to domestic corporations only (*See Moore agt. Genett*, 2 *Tenn. Ch.*, 375; *Christmas agt. Middle*, 13 *Pa.*, 223; *Childs agt. Digby*, 24 *id.*, 26; *Drake on Attachment*, *secs.* 244, 471, 478). This is decisive of the present case. The right to attach corporate shares depends upon the statute. The Hat Sweat Manufacturing Company was a foreign and not a domestic corporation. Section 647 is the only authority for the attachment of shares of a defendant in a corporation, and as that section does not apply to foreign corporations, it is immaterial to what extent the Hat Sweat Manufacturing Company may have brought its property or business into this state. We are also of opinion that the defendant was entitled to have the levy set aside and vacated, thereby relieving his stock from the cloud and embarrassment created by the proceedings (*See Dunlop agt. Patterson Fire Ins. Co.*, 74 *N. Y.*, 147; *Blossom agt. Estes*, 84 *id.*, 617).

These reasons lead to reversal of the order of the general term, and an affirmance of the special term.

Morgan *et al.* agt. Williams.

N. Y. SUPREME COURT.

HOMER MORGAN *et al.*, executors, &c., agt. ADELINE WILLIAMS, individually, and as executrix, &c., *et al.*, impleaded with ADELINE W. TURNER *et al.*

Will — Construction of.

Where the general scheme of the will of P. was the creation of a trust in the executors as trustees, the trust fund, comprising the whole estate, except as to certain legacies, all of which have long since been paid, during the lifetime of the testator's niece A. W. T., to whom was bequeathed a life annuity, payable in semi-annual instalments, the entire property to be kept invested and remain together until her death. The testator then divided the residue of the income of the estate into ten portions, and bequeathed the same severally to ten persons, directing payments to be made thereof from time to time until the arrival of the time when two certain legacies were to be paid. This has been done and the said two legacies paid, and the residue of the income arising from the investments which make up the trust estate, is now being paid pursuant to the tenth clause of the will, which reads as follows:

“*Tenth.* After the payment of the aforesaid legacies (meaning those last mentioned) * * * the remainder and residue of the income of my estate and property shall continue to be paid to (the said ten beneficiaries, naming them, including one J. W. W.), each having one-tenth part of the same. And this shall continue up to the time of the decease of my aforesaid niece A. W. T.”

“*Eleventh.* After the decease of my said niece A. W. T., and the payment of the aforesaid legacies, I order and direct that then all the residue and remainder of my estate and property shall be equally divided by my executors hereinafter mentioned between * * * (naming the said ten beneficiaries, including the said J. W. W.), each to have and receive one-tenth part of the same. And in case of the decease of either of the last mentioned residuary legatees, the part or portion which would go to such legatee so deceased, shall go to the child or children of the same; but if they have no child or children, then to the legal heirs of such legatee.” A. W. T. (the life annuitant) still lives, but the said J. W. W. died on the 6th of April, 1883, leaving a widow and four children, all of full age, and a will which provides:

“*Item 1st.* I give and devise to my wife the legacy coming to me from the estate of P. Also all property of every description during her natural life (she, however, selling so much thereof as may be sufficient

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to pay my just debts). At the death of my said wife said property and estate to be equally divided amongst my heirs as the law directs."

Held, that upon the happening of the death of one of the beneficiaries to whom a share of the income was, by the terms of the will of P., made payable during the life of A. W. T., as provided for in the tenth clause of the will, the share of the person so dying should thereafter be paid to the legal representatives of the person so dying up to the time of the death of A. W. T.

Held, also, that the testamentary disposition made by J. W. W. of the legacy coming to him from the estate of P., carries his portion of the income bequeathed to him by P., and it should be paid to the person entitled to receive the same under his will.

Special Term, December, 1883.

APPLICATION for a judicial construction of certain provisions of the will of Edward E. Powers, deceased.

The deceased, who was domiciled in the state of Georgia, died 12th June, 1855, leaving a will which was admitted to probate in the county and state of New York, and his entire estate, consisting exclusively of personal property, has remained there in the custody of the acting executor.

The general scheme of the will is the creation of a trust in the executors as trustees; the trust fund, comprising the whole estate, except as to certain legacies, all of which have long since been paid, during the lifetime of the testator's niece, Adaline Ann Williams, now Mrs. Adaline W. Turner, to whom was bequeathed a life annuity, payable in semi-annual instalments; the entire property to be kept invested and remain together until her death.

The testator then divided the residue of the income of the estate into ten portions and bequeathed the same severally to ten persons, directing payments to be made thereof from time to time until the arrival of the time when two certain legacies were to be paid.

This has been done and the said two legacies paid, and the residue of the income arising from the investments which make up the trust estate, is now being paid pursuant to the tenth clause of the will, which reads as follows:

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“*Tenth.* After the payment of the aforesaid legacies (meaning those last mentioned) * * * the remainder and residue of the income of my estate and property shall continue to be paid to (naming the said ten beneficiaries, including one Jefferson Warren Williams) each having one-tenth part of the same. And this shall continue up to the time of the decease of my aforesaid niece Adaline Ann Williams.”

The next clause, the eleventh, provides for the distribution upon the termination of the trust, and reads :

“*Eleventh.* After the decease of my said niece Adaline Ann Williams, and the payment of all the aforesaid legacies, I order and direct that then all the residue and remainder of my estate and property shall be equally divided by my executors hereinafter mentioned, between * * * (naming the said ten beneficiaries including the said Jefferson Warren Williams) each to have and receive one-tenth part of the same. And in case of the decease of the last mentioned residuary legatees, then the part or portion which would go to such legatee so deceased, shall go to the child or children of the same ; but if they have no child or children, then to the legal heirs of such legatee.”

Adaline Ann Williams (the life annuitant), now Mrs. Adaline W. Turner, still lives, but the said Jefferson Warren Williams died on the 6th April, 1883, leaving a widow and four children, all of full age, and a will dated 9th April, 1864, which has been duly probated, and which provides :

“*Item 1st.* I give and devise to my wife the legacy coming to me from the estate of Edward E. Powers, deceased, late of Columbus in the state of Georgia. * * * Also all property of every description during her natural life (she, however, selling so much thereof as may be sufficient to pay my just debts). At the death of my said wife, said property and estate to be equally divided amongst my heirs as the law directs.”

The widow was appointed and has qualified as the sole executrix.

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Henry P. Butler, for the plaintiffs.

R. V. W. Dubois, for the defendants, cited *Redfield on Wills*, 394, 398, 405; *Caulfield* agt. *Sullivan* (85 *N. Y.*, 153); *Parker* agt. *Bogardus* (5 *N. Y.*, 309); *De Peyster* agt. *Clandening* (8 *Paige*, 295); *Schley's Digest of English Statutes of Force in the State of Georgia*, 258; *Lumley on Annuities and Rent Charges*, 13, 14; *Savery* agt. *Dyer* (*Ambler*, 136); *Rawlinson* agt. *Dutchess of Montague* (2 *Vern.*, 666); *Brookman* agt. *Smith* (7 *L. R.*, *Exch.*, 273).

VAN VORST, *J.*—Upon an examination of the various clauses of the will of Edward E. Powers, which is now before me, and upon a consideration of the briefs submitted upon the reargument, I am satisfied that upon the happening of the death of one of the beneficiaries, to whom a share of the income was, by the terms of the will of Powers, made payable during the life of Adaline W. Turner, as provided for in the tenth clause of the will, the share of the person so dying should thereafter be paid to the legal representatives of the person so dying up to the time of the death of Adaline W. Turner (*Savery* agt. *Dyer*, *Ambler*, 139).

Jefferson W. Williams, who was entitled to a share of the income up to the time of the death of Adaline W. Turner, disposed of the legacy coming to him from the estate of Edward E. Powers by his will. Such testamentary disposition doubtless carries his proportion of the income bequeathed to him by Powers, and it should be paid to the person entitled to receive the same under his will.

Such is the construction to be given to the clause of the will of Powers under consideration upon a reargument and consideration of the question.

Goodridge agt. Connor.

NEW YORK CITY COURT.

LEONARD O. GOODRIDGE agt. CHARLES F. CONNOR,
receiver, &c.

Costs — What should be allowed on appeal from order made by general term of city court to the common pleas — Code of Civil Procedure, section 3251.

Upon an appeal from the city court, general term, to the common pleas, full costs follow, whether the appeal be from an order or a judgment and whether the appeal be dismissed or disposed of on the merits.

Special Term, December, 1883.

APPEAL from the clerk's taxation of costs.

Stickney & Shepard for plaintiff and appellant.

William J. Connors, for defendant and respondent.

McADAM, J.—The defendant appealed to the court of common pleas from an order made by the general term of the city court. The common pleas dismissed the appeal "with costs," and the clerk of the city court taxed the plaintiff's costs at "ten dollars," besides disbursements. The plaintiff appeals from the taxation, claiming that he should have been allowed the full statutory costs, the same as on an appeal from a judgment. The plaintiff is correct in his interpretation of the statute. While it is true that upon an appeal taken from certain orders to the general term of the city court but ten dollars costs and the disbursements are allowable, there is no distinction made in the statute regulating appeals from the city court to the common pleas as to whether the appeal be from an order or a judgment. There is but one fee bill in such a case, and it is applicable alike to all appeals. The provision in reference to costs is general. It allows: "Upon an appeal to the court of common pleas from the city court, before argument, twenty dollars; for argument, forty dollars; for

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each general term, not exceeding five, at which the cause is necessarily on the calendar, excluding the term at which it is argued or otherwise finally disposed of, ten dollars" (*Code, sec. 3251, sub. 4*), and it matters not whether the appeal be dismissed or otherwise disposed of, the same costs are taxable (*White agt. Anthony, 23 N. Y., 164*). This is the rule applicable to appeals from the common pleas to the court of appeals (*White agt. Anthony, supra; Brown agt. Leigh, 50 N. Y., 427*), wherein the language of the statute in regard to costs is similar. The practice upon appeals from the city court to the common pleas assimilates to that upon appeals from the latter court to the court of appeals, and must, as nearly as possible, be governed by the same rules. The clerk's taxation will therefore be reversed, with directions to retax the costs in accordance with the provisions of the Code before referred to.

SUPREME COURT.

JOHN F. CONOR agt. FRANK P. HILTON.

Code of Civil Procedure, section 3223 — Constriction of this section — Justices' court of the city of Albany — Its territorial jurisdiction confined to the city.

Section 3223 of the Code of Civil Procedure "embraces the entire subject of jurisdiction as regards that court, and was plainly intended so to do. Not purporting to amend any former or existing laws in that particular, they are repealed by necessary implication."

Under its provisions in relation to the "justices' court of the city of Albany," * * * providing that it shall have jurisdiction "*within the city where the court is located,*" the jurisdiction thereof is restricted to the city limits.

Accordingly *held*, that said court had no power to send process into adjoining towns for service, and that it acquired no jurisdiction by the service of a summons *outside* of the city (*Geraty agt. Reid, 78 N. Y., 64, followed*).

Third Department, General Term, November, 1883.

Before LEARNED, P. J., BOARDMAN and BOCKES, JJ.

Conor agt. Hilton.

APPEAL from judgment of Albany county court affirming a judgment of the "justices' court of the city of Albany."

The summons and complaint in the action were served upon the defendant in the city of Cohoes. The defendant appeared and objected to the jurisdiction, on the ground that the summons was not served in or "*within the city of Albany.*" The court overruled the objection and gave judgment for the plaintiff.

John T. Cook, for appellant.

Frederick E. Wadhams, for respondent.

•BOCKES, J. — This is an appeal from the judgment of the Albany county court affirming a judgment rendered by the justices' court of the city of Albany.

The objection urged by the appellant is that the city court was without jurisdiction, inasmuch as the summons issued in the action, although served on the defendant in the county of Albany, was not served on him within the city limits.

The power of the legislature, under the constitution, to declare the jurisdiction of inferior and local courts, is beyond question. The legislature has prescribed the jurisdiction of the justices' court of the city of Albany, that being an inferior local court.

Section 3223 of the Code of Civil Procedure provides that the court shall have jurisdiction "within the city" of actions of which a justice of the peace has jurisdiction, as prescribed in certain sections, conferring jurisdiction upon that officer. This section embraces the entire subject of jurisdiction as regards the city court. It does not purport to amend any former or existing law in that particular.

It was held in *Hickman* agt. *Pinkney* (81 N. Y., 211) that "when a latter statute, not purporting to amend a former one upon the same subject, covers the whole subject, and was plainly intended to furnish the whole law thereon, the former statute will be held to be repealed by necessary implication."

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The jurisdiction of the city court must consequently be determined on due construction of the section (3223) of the Code of Civil Procedure above cited.

That section provides that the city court shall have jurisdiction "within the city where the court is located," and the point urged is, that jurisdiction even to the service of the summons by which the action shall be commenced is confined to the city limits by the words above quoted.

On the other hand, it is insisted that those words are not to be construed in limitation of the territorial jurisdiction of the court save as to the place of trial — the place of holding the court. In other words, that the limitation is the same and no other than such as by law applies to justices' courts in the several counties of the state. This precise question was considered and decided in *Geraty* agt. *Reed* (78 N. Y., 64). The question there, as stated by chief judge CHURCH, was whether the justices' court of Brooklyn could have its process served outside of the city, it being claimed the justices of the city had the same authority as justices of the peace elected in towns to send process into an adjoining town. In that case the law declared that the district justices should "have the same jurisdiction in said city that justices of towns have by law in respect to the towns for which they had been elected," and that they should "be deemed justices of the peace of the county of Kings." Effect was given to the words "in said city," and it was held that they operated to limit the jurisdiction of the court to the city, even to the service of the process by which actions were commenced in that court.

Such court was held to be an inferior local court, and judge CHURCH says "the jurisdiction of a local court must be exercised within the locality and its process cannot be executed outside of it."

Now, in the case in hand, the city court was given jurisdiction "within the city" of Albany. It is an inferior local court, having jurisdiction "within the city." According to the decision in the case cited its process could not be executed

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outside of it. The summons was not, therefore, well served outside the limits of the city of Albany. It follows that the judgment appealed from must be reversed.

Judgment of the county court and of the city court reversed, with costs.

LEARNED, P. J., and BOARDMAN, J., concur.

SUPREME COURT.

JAMES McNULTY, plaintiff and appellant, agt. JOHN B. SOLLEY, defendant and respondent.

Arbitration — Effect of a submission when action is pending — Code of Civil Procedure, section 2366.

The mere submission of a cause to arbitration, the arbitrators never taking or consenting to take upon themselves the burden of the submission, operates as a discontinuance of a suit pending in court between the parties.

First Department, General Term, December, 1883.

Before DAVIS, P. J., and BRADY, J.

APPEAL from an order directing a discontinuance of the action.

James M. Smith, for appellant.

A. Cardozo, for respondent.

BRADY, J.—This is an action of slander and appears to have been once tried and once partially tried. The complaint was once dismissed, and upon the subsequent investigation and before it was concluded, a juror was permitted to be withdrawn on account of the illness of the counsel for the plaintiff. Subsequently the parties signed a paper as follows:

“We, the undersigned, hereby agree to leave our differences

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to the above named parties, Shether, Connett and Silverman, as arbitrators, whose decision shall be final.

(Signed) JAS. McNULTY,
JOHN B. SOLLEY.

“The within document was signed in our presence.

(Signed) J. D. F. HERSEY,
N. B. DAY,
FRANK A. ELLIS.”

In May, 1883, the plaintiff was directed to show cause why an order should not be made declaring the action discontinued, and why such other or further order or relief should not be made in the premises.

The facts already stated as characterizing the litigation are set out in the affidavit of the plaintiff. It was admitted by him that on the 27th of April, 1883, he and the defendant met for the peaceful settlement of certain differences, at which meeting the witnesses whose names are subscribed to the agreement of arbitration were present and formed themselves into a committee. It was then suggested and advised that the paper already mentioned should be signed. The plaintiff averred that since the signing of the paper no action whatever had been taken by either of the persons named in the paper, they having been selected without their knowledge or previous consent, and that one of them, Mr. Shether, declared he would not act; and he further alleged that he was ready and willing to comply with the terms of the agreement. And the plaintiff also presented for the consideration of the court an affidavit showing that a person called upon the defendant asking him to name a time when he would meet the committee, and substantially that he had failed to do so. This was denied by the defendant, who said that what he did say was that he would not attend upon the days named because of his business, but further that if he could attend on one of the days named he would send word.

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The submission to arbitration was therefore admitted. It is supposed by the appellant that the willingness of all the parties to act is an implied condition to the taking effect of the agreement, and that the refusal of the arbitrators to act leaves the parties in *statu quo*; and, further, that the agreement is defective as a binding agreement because it was not acknowledged as required by the Code. Both of these propositions are valueless. Whatever may be the effect of the refusal of the arbitrators to act in an arbitration where there is no pending action at law, and whatever may be the effects of the provisions of the Code upon an arbitration made with reference to them, these effects do not control the question presented by this appeal.

The provision of the Code, however (*sec.* 2366), evidently contemplate a submission to arbitration of any controversy existing between persons at the time of the submission which might be the subject of an action. The cases bearing upon the question of the effect of a submission to arbitration of differences when an action is pending have not declared that any particular form of acknowledgment is indispensable. It is enough that the parties have in writing agreed to a submission to arbitrators. In this case such an agreement is admitted to have been made. The effect of such an instrument has been declared in a number of adjudicated cases. It is to discontinue the action. And this seems to be the effect even if the submission was void (*Keep* agt. *Keep*, 17 *Hun*, 152, *where the cases are collated*; *see, also, Barrett* agt. *Western*, 66 *Barb.*, 205).

Justice MARCY, in *Larkin* agt. *Robbins* (2 *Wend.*, 505), said that the general position is, that a submission of a cause pending in court is a discontinuance of the suit, that the reason the submission operates as a discontinuance is, not because the subject of the suit is otherwise disposed of than by the decision of the court in which it was presented, but because the parties have selected another tribunal for the trial of it. And again: "The distinction that the plaintiff in error makes between a

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submission never acted on by the arbitrators and one which has been followed by an award or hearing by the arbitrators, does not appear to have been recognized by the court, nor do I see any good reason for making such distinction. * * * It is the agreement which withdraws the cause from the court and effects the discontinuance of the action." And it was also said by the learned justice that the point evidently for the consideration of the court was whether the mere submission of a cause to arbitration, the arbitrators never taking or consenting to take upon themselves the burden of the submission, operated as a discontinuance of the suit pending in court.

As justly observed by the counsel for the respondent, the refusal or omission of either party to attend before the arbitrators would not alter the consent, inasmuch as upon proper notice the arbitrators could proceed in the absence of the defaulting party.

It thus appears that upon the cases bearing upon the subject, the mere submission to arbitration operates as a discontinuance of the action, and the order appealed from could not be reversed without in effect reversing these decisions.

It follows that the order should be affirmed.

N. Y. CITY COURT.

JOSEPH S. COHN *et al.* agt. JOSEPH HUSSEN.

Answer — Reply — Code of Civil Procedure, sections 500, 514 — What reply to contain — Counter-claim.

A plaintiff cannot, in his reply, plead an independent counter-claim to a counter-claim set up by the defendant.

Special Term, December, 1883.

McADAM, J. — The defendant besides pleading a defense to the note sued upon sets up a counter-claim against the plain-

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tiffs for \$750. The defendants in their reply, after pleading a defense to said counter-claim, set up an independent counter-claim against the defendant similar in amount to that pleaded by the defendant. The defendant moves to strike out this counter-claim as unauthorized by law. The Code (*sec.* 500) permits a defendant to plead, in addition to denials and other defenses, a statement of any new matter constituting a "counter-claim." The Code (*sec.* 514) provides that where "the answer contains a counter-claim the plaintiff, if he does not demur, may reply to the counter-claim." The same section provides that "the reply must contain a general or specific denial of each material allegation of the counter-claim controverted by the plaintiff; * * * and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint constituting a defense to the counter-claim." But I find nothing in this or any other section of the Code which permits a plaintiff to plead an independent counter-claim to one pleaded by the defendant. There is, therefore, no warrant for such practice. There is a recognized distinction between a defense and a counter-claim. A defense may be defined to be the denial of the truth or validity of the complaint. In other words, it may deny the truth of the complaint, or it may admit the truth thereof and dispute the continued existence of the claim by plea of payment or discharge, and by way of mitigating the amount of the recovery may allege facts in recoupment. A counter-claim is more comprehensive than defense, set-off or recoupment, and secures to a defendant the full relief which a separate action at law would have secured him on the same state of facts. The counter-claim pleaded is inconsistent with the complaint, because if the plaintiffs succeed in their defense to the defendant's counter-claim they may recover the amount of their counter-claim, and thus recover a larger amount than they demanded originally in their complaint. The question may well be asked, what kind of a plea would the defendant be required to interpose to the counter-claim in the reply since

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the declaration, plea, replication, rejoinder, surrejoinder, rebutter and surrebutter of the former practice are not recognized by the Code as appropriate pleas? It follows, therefore, that the defendant's motion to strike out the counter-claim as unauthorized must be granted, with ten dollars costs, upon payment of which the plaintiffs may amend their reply in any form they may be advised, and without prejudice to any application the plaintiffs may elect to make to amend their complaint by including therein the cause of action pleaded as a counter-claim in their reply.

SUPREME COURT.

THE JOHN S. WAY MANUFACTURING COMPANY agt. SAMUEL CORN *et al.*

Bill of particulars — When motion for, will be denied—Code of Civil Procedure, sections 531, 802, 803.

In a suit to recover the proceeds of the sale of plaintiffs' goods by defendants, as agents, less their commissions, under a contract, the defendants set up a counter-claim for commissions upon other goods, under said agreement. The plaintiffs replied that the other goods sold were under contracts excepted from the agreement:

Held, that defendants are not entitled to a bill of particulars of such contracts, and of the goods furnished under them.

A party can only be required to state the particulars of his own cause of action or defense, and not the cause of action or defense of the adverse party.

Special Term, October, 1883.

POTTER, *J.*— This is a motion by defendants to compel plaintiffs to deliver to defendants a bill of particulars of the contracts plaintiffs had with the United States government for furnishing certain goods, with a description of the goods furnished under the contracts, &c. This action is brought by plaintiffs to recover of the defendants the proceeds arising from the sale of plain-

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tiffs' goods by the defendants, as agents, less their commissions, under a contract. The contract also provided that the defendants should have the selling of all the goods manufactured by plaintiffs, except buffalo robes, &c., and except goods ordered of plaintiffs without plaintiffs' solicitation. The defendants set up a counter-claim that plaintiffs sold goods to other parties which were solicited by plaintiffs and not embraced in the exception, and claim to receive the commissions specified in the contract on the goods sold by plaintiffs. The plaintiffs reply, alleging it sold only goods — buffalo overcoats to the United States government — under contracts made prior to the agreement between the parties, which were excepted from that agreement. Defendants moved for a bill of particulars of said government contracts and of the goods furnished under those contracts.

It will be perceived from this statement that the defendants make a claim against the plaintiffs for certain commissions. It is a cause of action in favor of defendants against plaintiffs, set up as a counter-claim to the claim set up by the plaintiffs against the defendants. I am not aware of any case, and have not been referred to any, where a party making a claim against another party may call upon that other party to give the party making the claim the bill of particulars of the claim.

It is provided by section 531, Code of Civil Procedure, that a party making a claim against another may be compelled to give the particulars, &c., of the claim he makes. That section and the general power of the court has been held by the court of appeals, in *Dwight agt. Germania Fire Insurance Company* (493), to embrace what is set up as a cause of action by one party against another, and also a defense put forward to a cause of action. But even with this extension or construction of the language of section 531, it is still limited in its operation to this reasonable rule, that a party can only be required to state the particulars of his own cause of action or defense and not the cause of action or defense of the adverse party.

In the notice of motion the parties have also sought a dis-

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covery of plaintiffs' books of account, not with the defendants but with others, viz., the United States government. If the plaintiff was compellable to produce and discover such books of account, the answer to the motion in that respect is that the defendant must proceed for that purpose by petition under the statute (*Code Civil Pro.*, secs. 802, 804).

Motion denied, with ten dollars costs.

SUPREME COURT.

JOSEPH EMRICH agt. LUCY E. WHITE.

Specific performance of a contract for the sale of real estate — When purchaser cannot bring an action for specific performance.

Where the alleged defects in the title were well known to both parties at the time of the contracting for the sale, and negotiations were entered into in respect to such alleged defects, and an agreement was executed which left it optional with the vendor whether she would bring an action for specific performance or not, and the vendee did reject the title on a tender of a deed to him, and the vendor subsequently elected not to bring an action for a specific performance by the vendee:

Held, that this put the vendee in default and he cannot bring a suit in equity to compel the vendor to give a full and perfect title.

Where any rights, which the vendee may have arising out of the transaction, can be protected by an action at law, specific performance ought not to be decreed.

Special Term, November, 1881.

THE action is brought by the purchaser against a seller, ostensibly to enforce the specific performance of a contract for the sale of real estate. The plaintiff rejected the title. He asks the court to determine that he was right in doing so, and to compel the defendant to make the title good, and then to convey to him the property at the price of \$9,000 specified in the contract.

On the 29th of June, 1880, the defendant, who is the widow

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of John H. White, through her agent, who goes by the name of Elial F. Hall, agreed in writing to convey to Joseph Emrich, the plaintiff, on the 20th July, 1880, two lots on the corner of Second avenue and Seventy-third street, for the price of \$9,000. No money was paid by Emrich on the execution of this agreement. By its terms he was to assume a mortgage on the premises for \$3,000, and pay the balance of \$6,000 in cash. Mrs. White did not agree to give a warranty deed, but only a bargain and sale deed. The title did not pass on July twentieth, the day appointed. On that day the plaintiff, as stated in his complaint, "did decline to pay the purchase-money provided for by the agreement of purchase and to accept a deed of the premises in suit by reason of defects which he then alleged in the title of the defendant." Mrs. White, "through her agent, gave the plaintiff verbally a few days further time to accept the deed and pay the purchase-money without a lawsuit." The plaintiff engaged one Mr. Bradley as counsel to examine the title, with special reference to the claims of the creditors of John H. White. Bradley decided that Mrs. White could not give a title that would be free from these claims. Prior to August seventh there were negotiations with a view to a submission to the general term of the question as to the title, upon a written statement of facts to be agreed upon, but no such statement of facts was completed or agreed upon. On the eleventh of September, this action was commenced.

The will of John H. White was probated on March 21, 1877 (more than three years, therefore, prior to June 29, 1880, the date of the contract in suit), and on the same day letters testamentary were issued to the defendant Mrs. White, as sole executrix. She filed her account on the 19th of August, 1879, which account was settled and allowed by a decree of the surrogate, entered and filed November 13, 1879. It appeared from this account that the personal assets of the testator were not sufficient to pay his debts. By the terms of the will the testator devised all his estate, after the payment

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of his debts, to his wife, the defendant. She held the title, therefore, to the premises in suit, as sole devisee, and not as executrix, as the will does not contain the usual power of sale. Accordingly, no deed was tendered by Mrs. White as executrix, but the deed tendered was in performance of a contract entered into by her individually.

Eliel F. Hall, for defendant. There is no authority that requires anything more of the vendor than that he be ready with a proper deed. Even the tender of a deed is waived by the vendee if he refuses to perform (*Lawrence agt. Miller*, 86 *N. Y.*, 131). When the state of the title is fully known to both parties, at the time of contracting for the sale, and the vendor offers the purchaser all the title he has, he does all in his power to perform his agreement. And if the purchaser declines accepting that title, he cannot bring a suit in equity to compel the vendor to give a complete and perfect title (*Mills agt. Van Voorhis*, 23 *Barb.*, 125; *Page agt. McDonnell*, 55 *N. Y.*, 299). This well settled rule is stated by Pomeroy in his work on Specific Performance (*see*, 442), as follows: "If the vendee, at the time of entering into the contract, knows or is sufficiently informed that the vendor's title is defective, or that his interest is partial, or that the subject-matter is deficient, he is not entitled to any compensation; if he insists upon a conveyance of what the vendor can give, he must pay the full price stipulated; and the vendor may, perhaps, force a specific performance upon him without compensation (*Peeler agt. Levy*, 26 *N. Y.*, 330; *Franz agt. Orton*, 75 *Ill.*, 100). A purchaser buying with full knowledge of a defect in the title of property, will not, for that defect, be permitted to come into equity for relief (*Cradlock agt. Shirley*, 3 *A. K. Marshall's Ky. Rep.*, 288, cited in 1 *Hillard on Vendors*, 223; *see, also, Rawlins agt. Timberlake*, 6 *Monroe*, 230). The defendant, by the terms of the will of her husband, is vested with the fee simple of the premises in question, but the title so vested in her is sub-

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ject to the charge of his debts. The plaintiff, as *bona fide* purchaser of the premises in question, was not bound to look after the application of the purchase-money paid by him to the defendant (*See* *Lufton* agt. *Lufton*, 2 *Johns. Ch.*, 623; *Reynolds* agt. *Reynolds' Executors*, 16 *N. Y.*, 259; *Wood* agt. *Wood*, 26 *Barb.*, 356; *Elliott* agt. *Merriman*, 2 *Atkyns*, 41; *Corser* agt. *Cortwright*, *Law Reports, Chancery Appeals* [vol. 8], 975; *affirmed in House of Lords English and Irish Appeals Cases* [vol. 7], 731; *Andrews* agt. *Sparhawk*, 13 *Pick.*, 393; *Gardner* agt. *Gardner*, 3 *Mason*, 217, 218; *Porter* agt. *Gardner*, 12 *Wheaton*, 502; 2 *Story's Equity Jurisprudence*, sec. 1130; and *see, also, secs.* 1127-1131; 2 *Wahsburn on Real Property, Book II, chap. 3, secs.* 4, 20; *Perry on Trusts* [2d and 3d ed.], sec. 802; 2 *Dart on Vendors and Purchasers* [5th ed.], pages 602 and 603; *Will of Fox*, 52 *N. Y.*, 530; *Dill* agt. *Wisner*, 88 *N. Y.*, 153).

Samuel Uttermeyer, for plaintiff.

LAWRENCE, J.—It seems to me that there are several answers to this action. In the first place I do not think that under the agreement of June 29, 1880, the defendant was under any obligation to bring an action for specific performance. That agreement contains provisions and conditions which are to apply and to become binding upon the parties in case the defendant elects to bring such an action, but I fail to discover anything in the agreement which renders it obligatory upon her to do so. In the second place this appears to be a case in which the alleged defects in the title were well known to both parties at the time of the contracting for the sale. Negotiations were entered into in respect to such alleged defects, and the agreement hereinbefore alluded to was executed, which left it optional with the defendant whether she would bring an action for specific performance or not. On the 20th of July, 1880, the day on which the contract was to have been closed, the plaintiff did reject the title, on a tender of

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a deed to him, and the defendant subsequently elected not to bring an action for a specific performance by the plaintiff. This put the plaintiff in default and he cannot bring a suit in equity to compel the vendor to give a full and perfect title. In this view it is utterly immaterial whether the objections to the defendant's title were sound or unsound (*Mills* agt. *Van Voorhis*, 23 *Barb.*, 125; *Page* agt. *McDonnell*, 55 *N. Y.*, 299). The subsequent negotiations of the parties did not, in my opinion, change the relations between them, which had been fixed by their own acts and by their mutual dealing in respect to the property.

Again, if the objection to the title of the defendant, which is urged by the plaintiff, is sound this is not a case in which a court of equity can decree a specific performance, providing that compensation be made to the purchaser. If the creditors of the defendant's husband have such a lien on the premises in question, as it is claimed they have, the amount which the plaintiff would be entitled to receive as an allowance or compensation on that account would be extremely large, if it did not equal, the entire purchase-price. Under such circumstances the authorities do not countenance the granting of a decree for specific performance at the suit of a vendor (*See Winne* agt. *Reynolds*, 6 *Paige*, 412; *King* agt. *Bardeau*, 6 *Johns. Ch.*, 38). And by the same reasoning it results that there should be no decree for a specific performance at the suit of the vendee.

Finally, under all the evidence in the case, I am of the opinion that any rights which the plaintiff may have arising out of the transaction in question can be protected by an action at law, and that in the exercise of a proper discretion specific performance ought not to be decreed.

For these reasons I am of the opinion that the complaint should be dismissed, with costs. The findings may be settled on two days' notice.

NOTE.—Affirmed by general term, November, 1883, on foregoing opinion.

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N. Y. SUPERIOR COURT.

NATHAN G. MILLER agt. R. H. PARKS *et al.**Arrest — When order of, will not be vacated on conflicting affidavits.*

Where the cause of action is identical with the ground of arrest the court will not vacate the order of arrest on conflicting affidavits.

Where the facts disclosed by the affidavits on both sides do not make a clear preponderance of evidence to show that the plaintiff cannot succeed in his action an order of arrest will not be vacated.

Special Term, November, 1883.

MOTION made by defendants to vacate order of arrest.

Charles Reed, for defendants.*Henry S. Bennett* and *Adolphus D. Pape*, for plaintiff.

INGRAHAM, J. — This action is for a conversion of four hundred shares of stock which plaintiff claims he deposited with defendants as security or margin in certain speculations which defendants were conducting for him, but which defendants claim was deposited with them to be used as security for a loan of money for the payment of a certain amount then due defendants. It appeared by the affidavits of plaintiff in opposition to the motion which defendants in their refuting affidavits do not deny, that the defendants pledged the stock in question, not to raise the money they alleged was due them, but two hundred shares thereof, with other securities, were pledged for the sum of \$52,000 which was largely in excess of any sum due defendants from plaintiff, and consequently plaintiff's stock was held as security for a sum of money borrowed by defendants for *their own use*.

This, I think, was an unlawful conversion of the plaintiff's stock by the defendants. Conceding that plaintiff subsequently authorized defendants to apply the proceeds of such stock over and above the amount due from plaintiff to their

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own use, the proceeds of the stock would stand in the place of the stock sold. It is not clear, therefore, admitting defendants statement to be true, that plaintiff would not be entitled to recover for a conversion.

But, after a careful examination of the affidavits, I do not think that the defendants have shown such preponderance of proof as would justify me in vacating the order of arrest, even under the rule as laid down by judge DANIELS in *Liddell* agt. *Paton* (7 Hun, 195).

That case, however, was an action in which an order of arrest was necessary to justify an execution against the person of the defendant, and consequently the cause of action was not identical with the grounds of arrest (*see opinion of Judge Daniels, p. 198*); and since that case was decided, the general term of the same court in *Welsh* agt. *Winterbaum* (14 Hun, 518), and the general term of the same court in the second department, in *Peck* agt. *Lombard* (22 Hun, 63), have decided that when the cause of action is identical with the ground of arrest the court will not vacate the order of arrest on conflicting affidavits.

The decision of the general term of this court in *Robbins* agt. *Falconer* (43 Superior Court, 370), was on the express ground that the cause of arrest was not identical with the cause of action, and that the judge in vacating the order of arrest did not pass upon any issues raised by the pleadings; and in *Bachman* agt. *Goldmark* (48 Superior Court, 549), an order denying a motion to vacate an order of arrest was affirmed on the ground that "the facts disclosed by the affidavits on both sides did not make a clear preponderance of evidence to show that the plaintiff could not succeed in his action."

This I think to be the true rule and, as on the trial of the action it is not clear that defendants will succeed, the motion to vacate the order of arrest should be denied.

Eigholt agt. The Mayor.

N. Y. COMMON PLEAS.

MARTIN L. ERGHOLT agt. THE MAYOR, &C., OF NEW YORK.

New York (city of) — Negligence — City not responsible for injuries sustained by a person by reason of a defect in the highway in the "annexed district" — Laws of 1873, chapter 613 — Duty of keeping in repair roads, &c, in annexed district imposed upon department of parks.

The mayor, aldermen and commonalty of the city of New York should not be held liable for injuries sustained by a person by reason of a defect in the highway in the "annexed district," because they were not guilty of negligence, the duty of keeping in repair the roads, streets and avenues in the annexed district not having been imposed upon them, but exclusively upon the department of parks, without any control by the said corporation.

VAN BRUNT, J., dissents upon the authority of the case of *Twogood* agt. *The Mayor*.

General Term, December, 1883.

Before C. P. DALY, Ch. J., VAN BRUNT and J. F. DALY, JJ.

APPEAL by defendants from judgment of this court, entered upon verdict in favor of plaintiff for \$25,000 damages for injuries sustained through the alleged negligence of defendants; also appeal from order denying defendants' motion for a new trial.

The case shows that on the night of February 27, 1881, which was dark, rainy, foggy and cold, the plaintiff was driving, in a covered rockaway drawn by a team of horses, from the city of New York to South Yonkers, along the public highway known as Broadway or old Kingsbridge road, when he accidentally drove into a ditch over a foot wide, and which extended across the highway at its junction with McComb street. The accident occurred in what is known as the annexed district, the territory separated from Westchester county and annexed to the city of New York by the act chapter 613 of the Laws of 1873.

Ergholt agt. The Mayor.

David J. Dean and *Chas. Blandy*, for appellants.

De Lancy Nicoll, for respondents.

J. F. DALY, *J.*—The mayor, aldermen and commonalty of the city of New York should not be held liable for the injuries sustained by the plaintiff in this case, because they were not guilty of negligence, the duty of keeping in repair the roads, streets and avenues of the annexed district not having been imposed upon them, but exclusively upon the department of parks, without any control by the said corporation.

Although the act of annexation (1873, *chap.* 613) and the acts amendatory thereof make the annexed district a part of the city of New York, and vest its public property in the said city, and declare in general terms that the mayor, aldermen and commonalty succeed to the trusts and duties of the several towns embraced by the district, yet the same statutes divide the public duties to be performed within the district between the mayor, aldermen and commonalty of the city of New York and certain of its independent departments, assigning specific duties to each.

Thus in section 11 of said act it is enacted that "the mayor, aldermen and common council of the city of New York, and all officers elected or appointed under the charter of the city of New York, or under any law of this state authorizing the election or appointment of officers for the city and county of New York, and also school commissioners, trustees and inspectors appointed or to be appointed, shall exercise the same powers and shall perform the same duties in and over the territory hereby annexed, and in each ward thereof, in like manner and to the same extent as if said territory had always been a part of the city of New York, except as may be specially limited, excepted or extended by this act," while in section 14 of said act it is provided that "the commissioners of the department of public parks of the city of New York shall have the exclusive power to locate and lay out, construct

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and maintain all public parks, streets, roads and avenues, and to devise plans for and locate all bridges and tunnels, and shall have exclusive control of the maintenance and construction of all public parks within the territory hereby annexed, and to construct and maintain all bridges, tunnels, sewers, streets, roads and avenues, so located and laid out," &c.

It is thus provided that the duty and power of maintaining — *i. e.*, keeping up or repairing — the streets, roads and avenues of the annexed district belongs to the park department commissioners to the exclusion of all other officers or bodies. The said department exercises, and has always exercised since its creation, independent powers derived, as in this case, directly from the legislature (*Laws of 1857, chap. 771; 1859, chap. 363; 1861, chap. 88; 1864, chap. 275; 1865, chaps. 564, 565; 1866, chap. 367, sec. 7; 1866, chap. 757, sec. 3; 1867, chap. 580, sec. 2; 1867, chap. 697, sec. 6*); and although the commissioners are appointed by the mayor, and the park department is one of the departments of the city government, yet, as the public duty to be performed by the commissioners in maintaining the roads, streets and avenues of the annexed district is not laid by the legislature upon the city, but upon the commissioners, and the city corporation has no private interest in that duty and derives no special benefit or advantage from it, the commissioners are not, with respect to that duty, servants nor agents of the municipality, and for their negligence, or that of their employes or officers, the corporation is not liable, even though such negligence be in the care of what is made by the act corporate or trust property of the city (*Macmillan agt. The Mayor, 62 N. Y., 160-165, and cases cited; Twogood agt. The Mayor, Com. Pleas Gen. Term, June, 1882*).

The case last cited (*Twogood agt. The Mayor*) has been quoted as sustaining the position that the duty of repairing the roads in the annexed district was imposed upon the city, notwithstanding that the act of 1873 confided the duty of maintaining such roads to the park commissioners. An

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examination of the case will show the contrary. That was an action against the city to recover damages for injuries sustained by slipping on the ice on the sidewalk around Christopher street park, a place within the original corporate boundaries. The question was whether the city or the park department was bound to remove obstructions caused by ice and snow on that sidewalk. The opinions written by judges VAN HOOSEN and BEACH explain the grounds upon which we held that that duty devolved upon the city. The city charter grants to the common council authority to regulate by ordinance the cleaning of streets, avenues, sidewalks and gutters, and the removal of snow and ice therefrom. There was no law imposing upon the park department the duty of cleaning the sidewalks and streets; that duty had from time immemorial rested with the corporation; any change involving so important a disposition of municipal obligation should be accomplished by clear enactment or a legislative intent not liable to misconstruction. The same charter clothed the park department with the management and control of all public parks and streets immediately adjoining above Fifty-ninth street, and public places which are of the realty of the city of New York, except buildings in the city hall park. The act of 1873, chapter 850, gives the department the right to determine lines of curbs and surface constructions in all streets and avenues within 350 feet from any public place or park, and provides that all moneys appropriated for the improvement and maintenance of public parks shall be deemed appropriated for the improvement and maintenance of the avenues and streets so bordering within that distance so far as the work of improvement and maintenance is done by said department. Judge BEACH held that the care and control of sidewalks and streets within that distance was not transferred from the city to the park department except for the restricted purpose of determining lines of curbs and other surface constructions, and that the application of funds for the maintenance of the streets, &c., relates to the maintenance

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authorized by existing laws relating to the department. Judge VAN Hoesen held that the proper construction of the statutes was that the park department was to determine what was to be done to beautify the streets adjoining the parks, while the public works department (an agent of the municipality) was to perform the manual work of carrying out those plans, that the department had nothing to do with keeping the pavement in repair or good condition — that was a duty resting upon the city.

The case at bar is distinguished from the foregoing in the following points: There was a question of a transfer of duty from the city, which had always performed it theretofore, to the park department, and it was held that express enactment or clear intent must be shown to effect such shifting of responsibility. Here there is no transfer of duty from one body to another, but an original enactment as to new territory, distributing the public functions among various officers. The city never had any duty to perform with respect to these roads, avenues and streets of the annexed district, and it requires, equally, an express enactment or manifest intent on the part of the legislature to charge it with such duty. But the express enactment as to the duty of maintaining the streets is that the park department shall perform that duty, and no other body or officer is charged with the duty. The duties of the former local officers of the district are transferred to the city, except as specially excepted, limited or extended by the act, and the special conferring on the park department of exclusive powers as to maintaining the street and roads falls within the exception.

The judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

C. P. DALY, C. J., concurs.

VAN BRUNT, *J.* — This action was brought to recover damages for injuries which the plaintiff had sustained by reason of a defect in the highway. The point raised upon this appeal

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that the defendants are not responsible for this injury because the street in question was in charge of the park department, seems to have been determined adversely to the defendant by this court in the case of *Twogood* agt. *The Mayor*.

It is urged that the neglect of the plaintiff in unnecessarily exposing himself to the cold and rain after the accident, had contributed to produce his disability and debars him from recovery, because the law is inadequate to separate the damages which were directly caused by the accident from that which were caused by the plaintiff's unnecessary and negligent exposure to the cold and rain. The answer to this proposition seems to be that although the jury have found that this exposure contributed to the increasing of the injury, yet, under the circumstances of the present case, they have also found expressly that the plaintiff was not negligent in thus exposing himself. If the plaintiff had known or had reason to believe that such exposure would enhance his injuries, then, perhaps, the point might be successfully urged; but he not knowing how much he was injured, and not knowing that this exposure would aggravate the injuries received, cannot be held guilty of negligence because he did not do the very best thing which subsequent events showed should have been done under the circumstances. The fact that he was suffering from a throat trouble, so severe that he was forbidden to expose himself to bad weather, does not alter this question, as the throat trouble does not appear to have had any connection with the injuries, damages for which were recovered in this action. The plaintiff had a right to show what his earnings had been prior to the accident. They evidently were the result of his personal exertions. It is true he was aided by others, but no more so is the lawyer or the physician. His earnings were not speculative profits arising from mercantile adventures, but were in the nature of a salary or compensation for services performed.

In the case of *Walker* agt. *Erie Railroad Company* (63 *Barb.*, 260), a lawyer was allowed to show what his previous earnings had been, and in *Phillips* agt. *London and South-*

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western Railroad Company (4 L. R., *Queen's Bench Division*, 406), a physician's previous income is expressly considered as an element in determining the amount of damage. The admission therefore of evidence as to the past earnings of the plaintiff was not error.

The objection to the question, "what was the condition of your health before that time?" is not well taken. A party certainly knows whether or not his health in past years has been good or not, and the opinion of an expert cannot be necessary upon such a question.

The defendants objected to the evidence offered as to the injury to the spine upon the ground that no intimation of such an injury was given in the complaint. The complaint alleged great bodily injuries generally. Under such allegation I see no reason why the plaintiff could not prove any bodily injury that he had received. If the defendants desired and were entitled to be apprised of the nature and extent of these injuries with greater particularity, they could easily have obtained a bill of particulars, whose very office is to supply just such information.

The case of *Stevens* agt. *Rodger* (25 Hun, 54) is not an authority to the contrary. In that case it is true that it was held to be error to allow testimony that paralysis of the right arm had resulted. The complaint alleged specific injuries and the plaintiff did not rely upon a general allegation of bodily injuries, and paralysis of the arm was not one of the injuries mentioned. The complaint contained a bill of particulars and the plaintiff was held to it. By the admission of the evidence in this case the rule that special damages, unless particularly alleged, cannot be recovered, was not infringed upon, the proof given relating to a bodily injury resulting from the accident and the direct result of such injury.

The question involved in the exception at folio 755 and the refusal to charge the twenty-second, twenty-fourth and twenty-sixth requests, have hereinbefore been discussed.

It cannot be that where a plaintiff has suffered an injury

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and without any negligence upon his part, and without in any manner having any suspicion that he thereby is increasing his injuries, does an act which aggravates them, that he is debarred of any recovery, which would be the result in the case at bar if the rule contended for by the defendants should prevail. If the defendants could have shown what part of the injuries were occasioned by the fall and what part by the subsequent exposure perhaps no recovery could be had for the latter, but the fact that it was impossible to make such a separation affords no reason for allowing the wrongdoer to escape the penalty which the law fixes upon his negligence.

The exception at folio 771 is not well taken, because it is in proof that the city had actual notice of this defect on February nineteenth, and the accident occurred on February twenty-seventh, and the question was expressly left to the jury whether or not the city had acted with a proper and reasonable degree of promptitude in making repairs after receiving such notice.

Judgment and order appealed from should be affirmed, with costs.

SUPREME COURT.

HORACE B. CLAFLIN and others agt. CLINTON H. SMITH
and others.

Bills of particulars—Power of court to order—When and how will be exercised.

The power of the supreme court to order bills of particulars extends to all descriptions of actions, and it may be exercised as well in behalf of the plaintiff as of the defendant.

In an action brought by plaintiff to set aside a general assignment made to one of the defendants for the benefit of creditors, the complaint alleged that the assignment was made, executed and delivered with intent to hinder, delay and defraud the creditors of the assignor:

Held, that defendants, who were by an order of the court allowed to intervene and be made parties defendant in this action, were entitled

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to an order that plaintiffs deliver to them a statement in writing of the times and places at which the plaintiffs expect or intend to prove any acts or things which serve to show that the assignment was done with fraudulent intent, and to what persons and at what times and places they will claim or offer to prove that the assignor made secret or other assignments of his estate.

At Chambers, December, 1883.

LAWRENCE, J. — The defendants who make this motion are judgment creditors of Clinton H. Smith, and this action is brought by the plaintiff to set aside a general assignment made by him to the defendant John G. Smith for the benefit of creditors. It appears that executions have been issued on the judgments recovered by the moving defendants against Clinton H. Smith, and that said executions have been returned wholly unsatisfied. By an order granted by Mr. justice PORRER the moving defendants were allowed to intervene and to be made parties defendant in this action; and they now ask that as the assignment in question is alleged in the complaint in general terms to have been made, executed and delivered with intent to hinder, delay and defraud the creditors of said Clinton H. Smith, the plaintiffs may be ordered to deliver to them a statement in writing of the times and places at which the plaintiffs expect or intend to prove any acts or things which serve to show that the assignment named in the complaint was done with fraudulent intent, as charged in the complaint, and particularly to what persons and at what times and places the plaintiffs will claim or offer to prove that the assignor, Clinton H. Smith, made secret or other assignments of his estate. In other words, they ask for the particulars of the grounds on which the plaintiff will claim upon the trial that the assignment in question was made with intent to hinder, delay or defraud the creditors of the assignor. In the case of *Dwight agt. The Germania Insurance Company* (84 N. Y., 493) the court of appeals held that the power of the supreme court to order bills of particulars extends to all descriptions of actions, and that it may be exercised as well in behalf of the plaintiff

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as of the defendant (*See, also, Tilton agt. Beecher*, 59 N. Y., 176). In this case there is nothing in the complaint which apprises the defendants of the ground on which the plaintiffs will claim that the assignment was executed with the intent to hinder, delay and defraud the creditors of the assignor. The defendants show that they as well as the plaintiffs are creditors of the assignor; that they are greatly interested in the proper defense of the action, and that the indebtedness to them, which is very large, was for merchandise sold by them to the assignor; that the assignee is thought by the creditors to be disaffected to the said assignment; that they are informed and believe that the plaintiffs give out that the assignor shortly prior to his insolvency transferred his estate, or some part thereof, so as not to have it passed by the deed of assignment, and that they thus intend to prove the fraudulent intent alleged, but that the defendants impleaded have no other or further knowledge of such assertion than that communicated by rumor, &c. They also allege that they do not know what witnesses will be necessary, or what facts will be *probative* under the vague and general allegations of the complaint, and that unless they are furnished with a bill of particulars of the times and places at which the assignor is said to have transferred his estate with a view to subtract it from the assignee, that they may be entrapped into a trial without due, legal and complete notice of the matters and things affecting their rights under the deed of assignment referred to in the complaint. My examination of the complaint leads me to the conclusion that the motion should be granted. The moving defendants, as has been before observed, are judgment creditors of Clinton H. Smith, the assignor, and the assignment is alleged to be a preferential assignment. It is not before me, but I infer from what was said on the argument that this controversy has in some measure arisen from those preferences. The moving defendants are interested as much in sustaining the assignment as the plaintiffs are in attacking it, and they are entitled, I think, to know precisely on what ground it is claimed to be

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fraudulent (*See particularly the remarks of FOLGER, C. J., in Dwight agt. Germania Life Ins. Co., before cited, 84 N. Y., 505; also McCreight agt. Stevens, 1 H. & E., 454; Pitts agt. Chambers, 1 F. & F., 684; West agt. West, 4 S. & T., 22; Jones agt. Bewicke, L. R., 5 C. P., 32; Kinder agt. Macy, 7 Cal., 206; Meeker agt. Harris, 19 Cal., 289).*

Let an order be entered in conformity with these views.

SUPREME COURT.

PETER MASTERSON agt. JEREMIAH A. CRANITCH.

Findings must be passed upon before decision.

The court must, at or before the time of rendering its decision, pass upon requests by either party to find certain facts and conclusions of law, and it is not sufficient that such findings should be passed upon on the settlement of the case.

First Department, General Term, December, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from order refusing to pass upon requests of the plaintiff to find certain facts and conclusions of law.

C. Finn, for appellant.

John Townshend, for respondent.

PER CURIAM. — Before passing upon the merits of the case we think it is necessary for the preservation of the rights of the parties that the record should be corrected. It appears by the papers before us that the plaintiff, after the close of the evidence in the case, submitted to the court a number of requests to find certain facts and conclusions of law. The court received such requests, but wholly failed to pass upon

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the same before the decision of the cause. In due time and before the decision was entered, the judge holding the court, on application of the attorney for the plaintiff, made an order directing the defendant's attorney to show cause why the court should not pass upon the requests of the plaintiff, as required by section 1023 of the Code of Civil Procedure. On the hearing of that motion the court declined to pass at that time upon the requests, but stated in the order upon its refusal that such findings would be passed upon on the settlement of the case. From that order this appeal was taken.

Section 1023 of the Code is as follows: "Before the cause is finally submitted to the court or the referee, or within such time afterwards, and before the decision or report is rendered, as the court or referee allows, the attorney for either party may submit, in writing, a statement of the facts which he deems established by the evidence, and of the rulings upon questions of law which he desires the court or the referee to make. The statement must be in the form of distinct propositions of law or of fact, or both, separately stated; each of which must be numbered and so prepared, with respect to its length and the subject and phraseology thereof, that the court or referee may conveniently pass upon it. At or before the time when the decision or report is rendered, the court or the referee must note, in the margin of the statement, the manner in which each proposition has been disposed of, and must either file or return to the attorney the statement thus noted; but an omission so to do does not affect the validity of the decision or report."

By this section it was very plainly the duty of the court to have passed upon the requests at or before the time when its decision was rendered. Language could hardly be more explicit than that of this section, and it was irregular in the court to postpone the findings thereon until the case should be afterwards settled. But it appears in the papers before us that when the case was settled, the findings were not passed upon. The effect is that if the case goes beyond this court

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the plaintiff is deprived of the right of review which section 993 of the Code was intended to preserve. Under these circumstances we think it our duty to suspend our decision upon the merits of the case and reverse the order appealed from, and direct that the proceedings be remanded to the court below, so that the requests may be passed upon, as required by section 1023, and that when passed upon the same be made part of the record as of the date of the decision of the case in the court below.

SUPREME COURT.

In the Matter of SOPHIE WATERS.

Vagrant — Record of conviction — Where should be filed — Code of Criminal Procedure, sections 892-963.

Section 892 of the Code of Criminal Procedure has been repealed or abrogated by the provisions of the consolidation act (*Laws of 1882, chap. 410*), and the filing of the record of conviction of a prisoner on a charge of being a vagrant, by a police justice in the office of the clerk of the general sessions of the peace is regular.

At Chambers, December, 1883.

N. S. Levy, for petitioner. •

Jas. M. Brady, assistant district attorney, for people.

LAWRENCE, *J.* — In this case it appears that the petitioner was convicted before the police justice on the charge of being a vagrant, and that the record of such conviction was filed with the clerk of the court of sessions. It is claimed by the petitioner's counsel that under section 892 of the Code of Criminal Procedure, it was the duty of the magistrate to have caused the certificate, which constitutes the record of conviction, to be filed in the office of the clerk of the county, and that in consequence of the omission so to file such certificate the prisoner is entitled to her discharge. Section 892 of the Code of Criminal Procedure does undoubtedly provide

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for the filing of such certificate in the office of the county clerk, and if there had not been subsequent legislation in relation to the subject there would be force in the argument of the counsel. By section 1465 of the consolidation act, it is provided that "if such magistrate, to wit, the police justice, be satisfied by the confession of the offender or competent testimony that such person is a vagrant within the description aforesaid, he shall make up and sign a record of conviction thereof, which shall be filed in the office of the clerk of the court of sessions," &c. Section 963 of the Code of Criminal Procedure provides "that this Code shall take effect on the 1st day of September, 1881. When construed in connection with other statutes, it must be deemed to have been enacted on the 4th day of January, 1881, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code." Section 2143 of the consolidation act provides that "for the purpose of determining the effect of this act upon other acts except the Penal Code, and the effect of other acts except the Penal Code upon this act, this act is deemed to have been enacted on the first day of January, in the year 1882. All acts passed after such date, and the Penal Code, are to have the same effect as if they were passed after this act." Taking these two sections together, it is apparent that section 1465 of the consolidation act is subsequent to section 892 of the Code of Criminal Procedure, and is authority for filing the record of conviction with the clerk of the court of sessions. There is another provision of the consolidation act which may with propriety be considered in the disposition of this case. That act it will be remembered was designed to consolidate all the special and local laws affecting public interests in the city of New York into one act. Section 1563 of the consolidation act provides that "the police justices shall in every case of commitment for vagrancy, file or cause to be filed in the office of the clerk, a record of the proceedings had before them or either of them, and such record shall contain, as part thereof,

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the proofs or confession taken by such justice, together with the prisoner's examination." It will be seen by referring to the marginal note opposite this section that the same was taken from chapter 268 of the Laws of 1855, and was designed to incorporate that act or the provisions of that act into the consolidation act. It will be observed, also, that in section 1563 the language is, "in the office of the clerk." By referring to the act of 1855, from which, as before shown, this section is taken, it will also be seen that the clerk referred to is not the county clerk, but the clerk of the court of general sessions. I am therefore of the opinion, in conclusion, that section 892 of the Code of Criminal Procedure has been repealed or abrogated by the provisions of the consolidation act, and that the filing of the record of conviction in the office of the clerk of the general sessions of the peace was regular, and that the writ must be dismissed and the prisoner remanded.

SUPREME COURT.

In the Matter of MORRIS LEWINSKI.

Children—under sixteen years of age, convicted of petit larceny, where to be confined—Not to be detained in city prison—Habeas corpus.

Where a child under sixteen years of age was tried and convicted by the court of special sessions of the city of New York, of petit larceny, and committed by the magistrate to the House of Refuge for the term of three months, and was taken by the sheriff to said House of Refuge, and was there tendered to the superintendent and managers thereof, but the said superintendent and managers refused to receive him, for the alleged reason, that he was committed for a specified time, and the sheriff returned the prisoner to the city prison; on *habeas corpus*:

Held, that there is no justification for the prisoner's detention in the city prison, and, as the House of Refuge has refused to receive him from the sheriff, that he is entitled to his discharge.

Is the House of Refuge such an institution as is described in section 4 of chapter 493 of the Laws of 1881, and therefore bound to receive the relator on the commitment of the court of special sessions (*quære*).

At Chambers, January, 1884.

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A HABEAS CORPUS was issued in this case to the sheriff of the city and county of New York and the warden of the city prisons, directing the production of the relator, &c. The sheriff made return to the writ, that he arrested and took into his custody the said relator under and by virtue of a certain transcript of the minutes of the court of special sessions of the peace, a copy of which was annexed to and made a part of the return. It appeared by such transcript that, on the 21st of December, 1881, the relator was tried for and convicted at the court of special sessions of a misdemeanor, to wit, petit larceny, for which it was adjudged, it appearing to the court that he was under the age of sixteen years, that he be sent to the House of Refuge, there to be dealt with according to law for the term of three months.

It further appeared from the return of the sheriff, that he took the said Lewinski on the 22d day of December, 1881, to the said House of Refuge, and then and there tendered him to the superintendent and managers thereof to be dealt with according to law, but that the said superintendent and the managers then and there refused to receive the said Morris Lewinski, for the alleged reason that he was committed for a specific time, which more particularly appears by the indorsement of said superintendent upon said transcript of the number of his said conviction, and that thereupon, he, the said sheriff, returned the said Lewinski to the city prison of the city of New York whence he had taken him, being unable to transfer him to said House of Refuge, and that he now holds and detains him in his custody by virtue of the warrant aforesaid.

Following is the indorsement of the superintendent of the House of Refuge upon the transcript referred to in the sheriff's return :

" Morris Lewinski being committed for a special term of three months is not admitted as an inmate of the House of Refuge, under resolution of the board of managers passed November 4, 1881.

ISRAEL JONES, *Supt.*

" *December 22, 1881.*"

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John D. Ahrens and *Walker & Cummins*, for relator.

Knox & MacLean, for Peter Bowe, sheriff.

Daniel G. Rollins, for people.

E. Randolph Robinson, for House of Refuge.

LAWRENCE, *J.*—Under the fourth section of chapter 496 of the Laws of 1881, I think it may be argued with much force that the House of Refuge is “an institution authorized by law to receive children on final commitment, and to receive and derive compensation therefor from city or county authorities,” and that, therefore, the institution was bound to receive the relator on the commitment of the court of special sessions. (*Wallack agt. The Mayor, &c.*, 3 *Hun*, 84). In the view which I take of this case it is not, however, necessary, to pass finally on this question. It appears from the return of the sheriff that on the day after the conviction of the prisoner, to wit, on the 22d day of December, 1881, he took him to the House of Refuge and Detention, and then and there tendered the said Morris Lewinski to the superintendent and managers, to be dealt with according to law; but that the said superintendent and managers then and there refused to receive the said Lewinski, on the ground that he was committed for a specified time, and that, therefore, he (the sheriff) returned the said Lewinski to the city prison, the place from whence he had taken him. By the act of 1881, already referred to, it is provided that “any such child convicted of any misdemeanor shall be finally committed to some such institution, and not to any prison or jail or penitentiary longer than is necessary for its transfer thereto.” If this were a direct proceeding to compel the House of Refuge to receive the petitioner into its custody, it would be necessary to definitely pass upon the question whether the House of Refuge is or is not such an institution as is described in section 4 of the act of

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1881; but it is not such a proceeding. The matter comes before me on *habeas corpus*, to inquire into the cause of the detention of the petitioner. It is quite plain that there is no justification under the commitment for his detention in the city prison. The act of 1881 expressly forbids the detention of a child, of the age of the prisoner, who has been convicted of any misdemeanor, in any prison or jail or penitentiary longer than is necessary for its transfer to one of the institutions mentioned in the act. There has been an attempted transfer in this case, so that it cannot be said that sufficient time has not elapsed to enable the authorities to have the transfer made. Is the boy to stay in the city prison until the question of the liability of the House of Refuge to receive him is settled by legal proceedings? Such cannot have been the intention of the legislature. I think, therefore, that there is no justification for the prisoner's detention in the city prison, and, as the House of Refuge has refused to receive him from the sheriff, that he is entitled to his discharge; and an order to that effect will be entered.

SUPREME COURT.

In the Matter of FRANCESCA and GIUSEPPI SERAFINO.

Children — Not allowed to beg, collect refuse, &c., from markets — Such occupation a misdemeanor — How punishable — Power of magistrate to determine age of child.

A child under the age of fourteen years who is found engaged in the occupation of collecting refuse from any market in a public street in the city of New York, is guilty of an offense punishable under the acts of 1877, and the act of 1881 amending the same, and may be committed by such magistrate to certain incorporated institutions, among which is the New York Catholic Protectory.

A police justice has the power and jurisdiction to so commit.

Such magistrate has the power, under the laws of 1882, to determine the

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age of the child by personal inspection. He is not obliged to direct an examination by a physician for that purpose.

The court has no power on *habeas corpus* to retry the questions of fact on which the findings of a court of original jurisdiction must be presumed to have been predicated.

At Chambers, December, 1883.

THIS was a *habeas corpus* directed to the managers of the New York Catholic Protectory, commanding them to produce the bodies of Francesca Serafino and Guiseppi Serafino. The return to the writ stated in substance that the persons therein named were committed to the protectory by Solon B. Smith, Esq., one of the police justices of the city of New York. The commitment in each case stated in substance that, after having in due form of law examined the complainant and the witnesses produced, and the said child, and it appearing to the satisfaction of the justice by competent testimony and evidence that the allegations and matters set forth and charged in the complaint are true, and that the said child was found unlawfully engaged in the occupation of collecting refuse from the markets in a certain public street to wit: Barclay street in the city of New York, in violation of the provisions of certain statutes referred to in the commitment, therefore the justice committed the child, apparently under the age of fourteen and above the age of seven years, to the said protectory.

Walsh & Fitzgerald, attorneys for Serafino.

Denis Quinn, attorney for the Catholic Protectory.

John B. Pine, attorney for the Society for the Prevention of Cruelty to Children.

LAWRENCE, *J.* — The return shows that the magistrate had jurisdiction. The offense is one punishable under the act of 1877, and the act of 1881 amending the same, and the magistrate had power, under the laws of 1882, to determine the age of the child by personal inspection. He was not obliged to

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direct an examination by a physician for that purpose (*See Laws of 1877, chap. 428, p. 486; Laws of 1881, chap. 496, p. 669; Laws of 1882, p. 421*). See also the opinion of the general term of this department *In the Matter of Wright* (29 *Hun*, 361 and 362), as to the power of the court on *habeas corpus* to retry the questions of fact on which the findings of the court of original jurisdiction must be presumed to have been predicated. The writ is dismissed and the prisoner remanded to the Catholic Protectory.

SUPREME COURT.

In the Matter of ALEXANDER FORSYTH, an infant.

New York Juvenile Asylum — Their power to bind out a child committed to their charge by a police magistrate.

The New York Juvenile Asylum of the city of New York have power, under the eighteenth section of their charter, in their discretion, to bind out a child who is under the age of fourteen and above the age of seven years, and who has been committed to said asylum by a police justice after having been proved by competent evidence to be embraced within the eighteenth section of the act, entitled "An act relative to the powers of the common council of the city of New York and the police and criminal courts of said city, approved January 23, 1883."

At Chambers, December, 1883.

THE writ commanded the superintendent of the house of reception of the New York Juvenile Asylum of the city of New York, to have the body of Alexander Forsyth before the supreme court of the state of New York, together with the time and cause of his imprisonment and detention. In the return to the writ, it was stated that the person in said writ mentioned and described was in the custody of the New York Juvenile Asylum, and detained therein under the mag-

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istrate's warrant of commitment thereto annexed, bearing date January 6, 1883.

That the said Alexander Forsyth, is not now and has not been in the custody of said New York Juvenile Asylum since the fifteenth of November, last past, but is in the custody of Herman Bartles, Bunker Hill, Macoupin county, state of Illinois. By the magistrate's warrant of commitment, which was directed to any one of the policemen in the city of New York, it was stated that "you are hereby commanded to take charge of Alexander Forsyth, a child under the age of fourteen and above the age of seven years, who has been proved by me by competent evidence to be embraced within the eighteenth section of the act, entitled 'An act relative to the powers of the common council of the city of New York and the police and criminal courts of said city, approved January 23, 1833,' and who also appears to my satisfaction to be a proper object for the care of the managers of the New York Juvenile Asylum in the city of New York, and to deliver the said child without delay to the said corporation at its house of reception in this city," &c.

John C. Fraser, for relator.

C. D. Adams, for New York Juvenile Asylum.

LAWRENCE, J.—The New York Juvenile Asylum's return to the writ: "That the person in said writ mentioned and described as Alexander Forsyth was in the custody of the New York Juvenile Asylum by and under the magistrate's warrant of commitment, hereto annexed, and bearing date January 6, 1883; that the said Alexander Forsyth is not now and has not been in the custody of said New York Juvenile Asylum since the fifteenth day of November last past, but is in the custody of Herman Bartels, Bunker Hill, Macoupin county, state of Illinois." By the commitment it appears that the child was committed to said asylum by police justice Power on the 6th day of January, 1883, which commitment

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recites that the child is under the age of fourteen and above the age of seven years, and has been proved by competent evidence to be embraced within the eighteenth section of the act entitled "An act relative to the powers of the common council of the city of New York, and the police and criminal courts of said city, approved January 23, 1883." It is claimed by the counsel for the petitioner that under chapter 112 of the Laws of 1878, section 1, the Juvenile Asylum was prohibited from binding out this child at any time before one year had elapsed from the date when he was placed in the care or custody of said asylum. There is no positive evidence before me that such child has been bound out to the party mentioned in the return, but I think that it may be fairly said that that fact was assumed to exist on the argument. But assuming that to be so, I am of the opinion that this case is not governed by the act of 1878, but by section 18 of chapter 245 of the Laws of 1866, which is an act amending the act incorporating the New York Juvenile Asylum. Section 18 of that act provides "that the said corporation shall have power in its discretion to bind out or indenture as clerks or apprentices, in this state and also in any state of the United States which shall by its laws recognize the validity of such indentures, to some profession, trade or employment, the children intrusted or committed to its charge, and for a shorter or longer period, not exceeding the age of twenty-one years males, and eighteen years for females." This act is not repealed by any provision which I have been enabled to find in the act of 1878, above referred to. The first section of that act refers to the binding out of children who have been surrendered to the care or custody of an orphan asylum or other incorporated institution, by the parent or guardian thereof, or left to its care with no provision for support, for the space of one year, or placed there by the superintendent of the poor of the county, or the overseers of the poor or board of charities of any city or county within which said asylum is located. In this case the child Alexander Forsyth

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does not come within either of the cases designated in said first section of the act of 1878, inasmuch as the commitment was by a police magistrate. The third section of the act of 1878 does not apply to this case, as it seems to me, for the reason that that section refers to the adoption of children who have been placed under the care and custody of any incorporated charitable institution, or for their transfer to any incorporated non-sectarian institution or society, to be selected by parties or persons seeking homes or occupations for children, if said society shall consent to receive them. As I have before remarked, the act of 1866, amending the charter of respondents, is not repealed by chapter 112 of the Laws of 1878 in terms. The latter act is entitled "An act to amend chapter one hundred and fifty-nine of the Laws of eighteen hundred and fifty-five, entitled 'An act to allow the trustees, directors or managers of incorporated asylums to bind out orphans or indigent children surrendered to their care.'" These acts are general acts, and are not designed to control the particular powers vested in institutions incorporated under special charters. It appears to me, therefore, that the respondents had power, under the eighteenth section of their charter, in their discretion, to bind out the child in question to a person in the state of Illinois, if the laws of Illinois recognize the validity of such indentures, and, as in this case there is nothing before me to show that the laws of said state do not recognize the validity of such indentures, the validity of the same will be assumed. Even if I am wrong in my construction of the statute, as the respondent shows that the child was not in its custody when the writ was served, and as there is nothing before me to show that he was sent out of the state for the purpose of evading the process of the court, I do not think that I can do otherwise than to dismiss this writ.

Ebbets agt. Quick *et al.*

SUPREME COURT.

JAMES T. EBBETS, plaintiff, agt. MARIA D. QUICK *et al.*,
defendants.

Will — Construction of — Words which do not create an entail.

Where a testator gave his real estate, after the death of his wife, to his four children, and their heirs forever, and provided that if any of them should die without issue, then their portion “to return to the surviving heirs:”

Held, that no entail was created, and that the gift over to the surviving heirs, meant the heirs of the testator, and that the devise over, in the event of either of the children dying without issue, was valid.

Special Term, December, 1883.

THIS is a suit for partition of property, Nos. 41 Broad street and 473 Greenwich street, in the city of New York. The property is held undivided under the will of William Quick, made before the Revised Statutes. He died in 1824.

Francis Lawton, Jr., for plaintiff.

S. H. Thayer, for defendant M. D. Quick.

VAN VORST, *J.* — The clause in the will of William Quick, deceased, which is submitted for construction is in these words:

“I give and bequeath unto my beloved wife, Sarah Quick, all my real and personal estate during her widowhood, and after her decease to be left to my four beloved children, to be equally divided, namely: James Quick, Maria D. Quick, Joanna Quick, John D. Quick, to them and their heirs forever; provided, if any of them should die without issue, then their property to return to the surviving heirs.”

The widow and three of the testator's children have died. Two of the children died without leaving issue. They, however, left wills by which, as it is claimed, they disposed of the shares given them in their father's estate. The contest is

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substantially between the devisees under the wills of the two deceased children of the testator and his surviving heirs.

After a careful consideration of the subject, I reach the conclusion that the gift over to the "surviving heirs" of the testator, William Quick, is a good and valid devise.

The primary gift to the four children of the testator was in fee simple absolute, yet by force of the whole devise, every part of which should be considered in construction, the estate before given was in fact determinable upon the death of any of them without issue, and upon the happening of that event the estate of the child so dying passed to the surviving children of the testator and their heirs. The words "should die without issue" refer to the time of the death of the deceased child of the testator, and the words "surviving heirs" mean heirs of the testator, and refer to the same period. The limitation over is not predicated upon an indefinite failure of issue at any time, however remote, if it was, the gift over could not be sustained. Ulterior limitations after a fee have in some cases been held void upon the ground of repugnancy, but not always. In this instance, fair and judicious construction obviates that difficulty. No estate tail is created; certainly not directly. The primary gift is to the children and their "heirs" general, and in view of the gift over upon the contingency above mentioned, under the construction adopted, none was intended.

The intention of the testator, so clearly expressed, should be carried out, as it violates no rule of law.

In *Anderson agt. Jackson* (16 *Johns.*, 382), where the will provided that if either of the testator's sons "should depart this life without lawful issue, his share shall go to the survivor," it was held that the words did not create an entail, "but was a good limitation over in fee, by the way of executory devise to the survivor, on failure of issue living at the death of either of the sons" (*Cutler agt. Doughty*, 23 *Wend.*, 518; *Diamond agt. Stringham*, 26 *Barb.*, 107; *Wilson agt. Wilson*, 32 *Barb.*, 328; *Lyth agt. Beveridge*, 58 *N. Y.*, 594).

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The gifts over, therefore, upon the death of such of the testator's children as died without issue, are determined to be valid, and the rights of all the parties are to be fixed upon that principle.

Judgment is ordered for the plaintiff; findings to be settled on notice.

N. Y. CITY COURT.

BLANCHE E. RICE agt. HATTIE W. BLISS.

Summary proceedings—Landlord and tenant—When deposit made by tenant as security for the faithful performance of the covenants of the lease, cannot be recovered back.

Where a tenant hired premises for one year from May one, at a monthly rental, and made default in the payment of the June rent, and was dispossessed in consequence under a warrant issued in summary proceedings founded on such default:

Held, that a deposit made by the tenant to the landlord at the time of the hiring "as security for the faithful performance by the tenant of the covenants on her part contained in the lease," cannot be recovered back. The reasons stated.

Trial Term, December, 1883.

TRIAL by the court without a jury.

The plaintiff, as landlord, let to the defendant, as tenant, the premises known as No. 27 West Thirty-first street, for one year from May 1, 1883, at the yearly rent of \$3,300, payable monthly in advance. In consideration of the letting the plaintiff deposited with the defendant \$275, under an agreement that this sum should be held by the defendant "as security for the faithful performance on the part of the plaintiff of the covenants contained in the lease." The tenant paid the rent for May, 1883, but made default in the payment of the June rent. In consequence of this default summary proceedings were commenced, and on the 8th day of June, 1883, the tenant was, under the warrant issued in

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said proceedings, dispossessed. The plaintiff brings the present action to recover back the \$275 deposited (less seventy-two dollars, the reasonable value of the premises from June one to June eight, the day on which the warrant of dispossession was issued).

C. A. Runkle, for plaintiff.

McDonald, Wheeler & Souther, for defendant.

McADAM, J. — The issuing of the warrant in the summary proceedings cancels the agreement for the use of the premises, and annuls the relation of landlord and tenant, except that it does not prevent a landlord from recovering by action any sum of money which was, at the time when the precept was issued, payable by the terms of the agreement (*Code, sec. 2258; Hinsdale agt. White, 6 Hill, 507*). The plaintiff claims that as the lease has been annulled by the act of the landlord, and by operation of this statute, that after deducting the rent from June first to June eighth, the day on which the warrant was issued, that the covenants of the lease have been performed by the tenant, as far as performance is possible, and that by the terms of the agreement, under which the deposit was made, the sum deposited, less said deduction must be returned. But this result does not follow. The tenant did not "faithfully perform the covenants on her part, contained in the lease." She made default in the payment of the June rent, and the summary proceedings commenced by the plaintiff were founded on that default. The issuing and execution of the warrant, it is true, terminated the rights of the tenant under the lease and restored the plaintiff to the possession of the premises demised. Whether this was advantageous or disadvantageous to the plaintiff is an inquiry not necessary to make, nor is it requisite to inquire whether the deposit made is inadequate or more than sufficient to recover any loss which the tenant's default may have occasioned. It is enough that by the agreement of the parties,

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the deposit was to be returned only upon condition that "the tenant faithfully performed all the covenants of the lease on her part." She failed to perform the most substantial requirement of the lease, and cannot by her own default give rise to a cause of action. The statute, it is true, annuls the rights of the tenant under the lease, and in turn relieves her from the payment of rent after the issuing of the warrant, but it does not confer upon her any new rights or privileges. The sum deposited, no matter whether inadequate or not, was, after the warrant of dispossession, the only indemnity to which the defendant could look for recompense. If insufficient in amount, the plaintiff could maintain no action for the deficiency, and if, on the other hand, it proved more than sufficient, this is the good fortune of the landlord, which does not inure to the benefit of the defaulting tenant.

The cancellation of the lease, by operation of the statute in question, is not tantamount to a voluntary rescission of the contract by the mutual assent of the parties, so that each is to be restored to the position she originally occupied. It is more in the nature of a judgment of condemnation against the tenant, by which she is adjudged in default, and for such default is, by act of the law, deprived of rights which she otherwise might have retained.

If the tenant had paid her rent and performed the substantial covenants of her lease, and the landlord had refused to return the deposit solely on technical grounds, a different question might have arisen; but in the present case the tenant concedes, and the judgment of dispossession establishes the breach of a substantial covenant upon her part, and this without any legal excuse for non-performance. There can be no apportionment in such a case in favor of the wrong-doer.

A number of reported cases between vendor and vendee of real estate will be found to contain principles analogous to those to be decided here. A few of them will be referred to. Thus, in *Ketcham agt. Erertson* (13 *Johns.*, 346), it was held that the sale of property by the vendor after the refusal of

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the vendee to accept a deed thereof, in pursuance of his contract, was not a rescission of the contract by the vendor which entitled the vendee to recover back the portion of the purchase-money paid. In the case just cited it was aptly said (*p.* 365): "It would be an alarming doctrine to hold that the plaintiffs might violate the contract and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain and has advanced money upon it would have the same right to recover it back that the plaintiffs have. The defendant's subsequent sale of the land does not alter the case."

In *Hayes agt. Hunt* (42 *Barb.*, 58), judge JOHNSON said: "No case can be found where a purchaser has been allowed to recover back partial payments after default in making further payments, when the vendor has merely kept the property agreed to be sold or sold it to another in consequence of such default." To the same effect see *Page agt. McDonald* (46 *How. Pr.*, 52; *affirmed by the court of appeals, Ib.*, 299). Another view may be taken of the case with the same result. The rent was payable in advance, and the landlord became entitled to the rent for the entire month of June, notwithstanding the dispossession of the tenant (*Healy agt. McManus*, 23 *How. Pr.*, 238; *Cushingham agt. Phillips*, 1 *E. D. Smith*, 416), and the month's rent equals the amount of the deposit. So that, upon either ground, it follows that there must be judgment for the defendant.

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SUPREME COURT.

In the Matter of the Petition of McMAHON, as Receiver of Taxes, &c., to enforce a personal tax against FOWLER BROTHERS.

Taxes and assessments — When non-resident firm liable to a personal tax.

A foreign firm, doing business in Liverpool, England, and having a resident member in New York carrying on the business tributary to the business in Liverpool, such business being buying and receiving property, the products of other states, for sale in England and Europe, and having money here (though temporarily) for the purpose of use and investment in said business, is liable, under the act of 1855, to taxation on the sums invested in their business in this city (*Laws of 1855, chap. 37*).

At Chambers, December, 1883.

S. Beardsley, for the collector of arrears of personal taxes.

John J. Townsend, Jr., assistant corporation counsel, for petitioner.

Kelly & McRae, for respondent.

LAWRENCE, *J.*—It is too late to attack the amount of the assessment or of the tax imposed, inasmuch as it nowhere appears that the firm of Fowler Brothers availed themselves of the provisions of the statute which relates to an erroneous assessment and the correction thereof (*Smyth agt. International Life Assurance Co.*, 35 *How. Pr. R.*, 126, and cases cited). The resident member of the firm, who makes an affidavit in opposition to this proceeding, admits that it is carrying on business here, but alleges that that business is tributary to the business in Liverpool, and that there are no moneys in this city over and above the indebtedness due from the business here to the head office in Liverpool. It is also alleged that the business done by said firm in this city is in

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buying and receiving property, the products of other states, for sale in England or Europe, and that the money of said firm on hand here is only temporarily here for the purpose of use or investment in said business, so far as it may be necessary, in this city. It is further stated that the partner making the affidavit is the only member of said firm who resides in this city, and that all the other members are non-residents of the city and state, and that all the taxes assessed against such partner as a resident have been paid. The case of *Williams* agt. *The Board of Supervisors of Wayne county* (78 N. Y., 561), does not avail the respondents, for the reason that there the property assessed consisted of bonds and mortgages, some of which had been sent to an agent for collection by a non-resident of the state, and the residue had been taken by him on reinvestments, and had been left or deposited with him for collection. So far as that case can be considered as affecting the state of facts disclosed in this case, it is an authority in favor of the tax. Judge RAPALLO (*at page 567*), in speaking of the act of 1855, under which the tax under consideration was imposed, says: "The act of 1855 does not relate to foreign capital in the hands of agents here or loaned to our citizens, but to capital managed here by the non-resident owners themselves, and was designed to remedy an evil then existing, which mainly consisted of persons residing near the borders of our state carrying on trades and business here in competition with our own citizens, and while enjoying the protection of our laws escaping all the burdens of taxation by having their residences beyond the boundary line." In this case it is admitted that the firm have a resident partner who manages the business for the benefit of the non-resident partners and himself. In the case of *The People ex rel. The Bank of Montreal* agt. *The Commissioners of Taxes* (59 N. Y., 40), the decision was placed upon the ground that as the bank controlled the capital sent here to its agent for temporary loans, such capital was not to be regarded as invested in a business done here, within the meaning of the act of 1855

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(see *Laws of 1855, chap. 37*), and at page 43 RAPALLO, J., explains the meaning of the act of 1855, and shows that it was not intended to repeal the provisions of the act of 1851, chapter 176, section 2, which exempted from taxation products of other states consigned here for sale on commission and money transmitted to agents of moneyed corporations or capitalists for the purpose of investment. The case of *The People ex rel Hoyt agt. The Commissioners of Taxes* (23 N. Y., 224), involved an attempt to tax the personal property of a resident which was situated in another state, and does not affect this case. In the case of the *Parker Mills agt. The Commissioners of Taxes*, (23 N. Y., 242), it was held that the goods of a non-resident owner, sent here for the purpose of sale without reinvestment of the proceeds are not liable to taxation under the act of 1855, and that the act was designed to reach the capital of non-residents employed within this state in a continuous business, and not property sent here only as to a market for sale. Now, in this case, while it is alleged that the business done by the firm in this city is in buying and receiving property the products of other states for sale in England or Europe, and that the money of said firm on hand here is only temporarily here for the purpose of use and investment in said business, so far as it may be necessary, in this city, it does appear that the firm has a continuous business here, that the resident partner has been a member of said firm for over five years last past, and that the business here is a branch of that carried on at Liverpool. It is not the case of a firm which has an agent here merely to buy or to make temporary loans, but of a firm which has set up a branch establishment as an accessory or tributary to the business carried on in England. None of the cases cited by the respondent seem to me then to apply to this case. There are several other cases in which the act of 1855 has been the subject of consideration. In the case of the *British Commercial Life Insurance Company* (1 Abb. Ct. App. Cases, 199), it was held that a foreign life insurance

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company doing business in this state, was liable to be taxed on the deposit made by it with the comptroller of the state (*See S. C.*, 1 *Keyes*, 303 ; *S. C.*, *below*, 28 *Barb.*, 318). In that case it appeared that the company had twenty-eight agencies in this state for the purpose of receiving applications for insurance, that the agents received the applications, and that upon the approval of the risks by the directors in England the policies were made out and transmitted to the agents here, who transmitted to the company the premiums received by them, and that the losses were paid by the agents. In that case the business done here was purely tributary to the main business in England. Not a risk could be accepted here, until it was approved there, and the premiums received here were all sent to the main office there. It is true that in that case there was a permanent fund in the hands of the comptroller, but according to the affidavit of Mr. Fowler there is in this case money here "for the purposes of use and investment in said business." It is true that he says it is only temporarily here, but it is here for the purpose of investment in the business of the partnership, which seems to me to bring it within the terms of the act of 1855. In *Duer agt. Small* (17 *How. Pr. R.*, 201), the plaintiff was a resident of the state of New Jersey and a member of the firm of James G. King & Sons, bankers in the city of New York. It was held by the United States circuit court that he was liable to taxation on his personal property invested in that business. It is not so expressly stated in the report of the case, but the fact was that some, if not all, of the other partners resided in this city and were liable to taxation here. As I have before remarked, in this proceeding the amount of the tax cannot be inquired into ; that should have been the subject of an application to the tax commissioners, and if the application was refused the decision would have been subject to review on *certiorari* (*Smyth agt. International Life Ins. Co.*, 35 *How.*, 128). The only question in the case is as to the liability of the firm to taxation on the sums

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invested in their business in this city, and under the act of 1855, I think that such liability existed. The fact that the resident member has paid taxes imposed upon him individually does not affect the question. It nowhere appears that he was assessed for the moneys of the firm, and the fact that he was assessed as an individual does not affect the liability of the firm to taxation (*Duer agt. Small, supra*). On the whole case, I am of the opinion, therefore, that the prayer of the petitioner should be granted.

SUPREME COURT.

MATTHEW Y. CHESEBRO agt. JOHN J. HICKS, as administrator of the goods, &c., of MARY E. HICKS.

Executor—In action against, when and how costs to be awarded—When the refusal of an executor to pay a claim is not unreasonable—Code of Civil Procedure, section 1836.

In an action brought and a recovery had against an executor to justify the imposition of costs against such executor it must appear that the claim was presented to the executor after he had qualified and entered upon the discharge of his duties, and that after such presentation and before suit he refused to refer it as prescribed by law, or that he unreasonably resisted or neglected its payment.

A motion for costs will be denied where there is no legal proof of the presentation of the claim sued on, after the granting of letters of administration to the executor, and of its rejection by him.

It is not an "unreasonable resistance of a claim" which was barred by the statute of limitations, unless there had been a payment thereon by the deceased, whose estate the executor represented and of which he had no personal knowledge, to require the proof thereof to be submitted to a court in an action in which he voluntarily appeared in order that no charge of want of fidelity to the estate could be made.

Ulster Special Term, October, 1883.

MOTION on behalf of plaintiff for costs after recovery against the defendant.

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James Lansing, for plaintiff and motion.

Louis K. Church, for defendant, opposed.

WESTBROOK, J. — At the Albany circuit, on June 29, 1883, the plaintiff by direction of the court had a verdict in the above entitled action for \$3,302.60. The suit was brought upon a promissory note made by Mary E. Hicks, deceased, on the 1st day of May, 1866, at Brooklyn, New York, and dated at that place and on that day, whereby she promised to pay Margaret Chesebro, or to her order, \$1,600 in one year from the date thereof with interest. On the 1st day of April, 1867, one year's interest and fifty dollars of the principal was paid upon the note, and on February 24, 1877, ten dollars as interest was also paid thereon by Mary E. Hicks, who was then living.

The last payment (that of February 24, 1877), was made by the deceased in the presence of a sister, who proved the same upon the trial. The deceased and the sister, who was the witness, were both daughters of the plaintiff. The defendant, who was the husband of the deceased, and is her administrator, testified that he was entirely ignorant of the last payment, and no proof was given upon the trial tending to show that he had knowledge thereof.

The defense to the note was the statute of limitations, and that the money for which the note purported to be given, was an advancement by the plaintiff to the deceased, as his daughter, and its repayment was not to be demanded. Upon the facts proved, the court ordered a verdict for the plaintiff, who now moves for costs upon the ground that the claim was unreasonably resisted.

The deceased, Mary E. Hicks, died in December, 1877. The defendant was appointed administrator of her estate April 1, 1882. The summons in the action is dated May 27, 1882, and the defendant appeared in the action by Mr. Louis K. Church, as his attorney, voluntarily, without the service of such summons upon him.

The Code of Civil Procedure (*sec.* 1836) provides: "When

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it appears * * * that the plaintiff's demand was presented within the time limited, by a notice published as prescribed by law, requiring creditors to present their claims, and that the payment thereof was unreasonably resisted or neglected, or that the defendant refused to refer the claim, as prescribed by law; the court may award costs against the executor or administrator, to be collected either out of his individual property, or out of the property of the decedent, as the court directs, having reference to the facts which appeared upon the trial. Where the action is brought in the supreme court, or in a superior city court, the facts must be certified by the judge or referee before whom the trial took place."

In *Field agt. Field* (77 N. Y., 294), the court of appeals (*see page 296*) held, "claims may be presented at any time after the executors qualify and enter upon the discharge of their duties, and while they are entitled to a reasonable time to examine and decide upon the justice of claims presented, when they do decide, even though no notice has been published, the effect of their decision is the same as though the claim was presented after publication."

According to the Code, and decision referred to, to justify the imposition of costs upon the defendant, it must appear that the claim was presented to the defendant after he had qualified and entered upon the discharge of his duties, and that after such presentation and before suit he refused to refer it, as prescribed by law, or that he unreasonably resisted or neglected its payment.

It is not urged in behalf of the plaintiff that the defendant refused to refer the claim, but it is insisted that he "unreasonably resisted or neglected its payment." Do the affidavits now presented, or the facts which appeared on the trial, show that there has been such unreasonable resistance or neglect of payment?

The affidavits presented on the part of the plaintiff are exceedingly general in their statements, and instead of detail-

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ing specific interviews with the defendant, giving their dates, or where correspondence has been had giving such correspondence, the general results of such interviews or of the correspondence are stated. The plaintiff, for example, alleges that he visited the defendant at New York "prior to the commencement of the action" (whether before or after the appointment of the defendant as the administrator of his wife is not stated), and that the defendant, though familiar with the facts of the case, "both from his own knowledge and from deponent's statements," and though "the defendant did not dispute or question the fact of" the renewal of the note by payment, "or deny his knowledge thereof," yet he refused "to allow it as a claim against the estate, but compelled deponent to resort to the courts for the recovery thereof." So, too, the daughter of the plaintiff speaks of negotiations with the defendant by correspondence "both after and before letters of administration," and that subsequent to such letters of administration demand was made for the payment or allowance of said claim upon several occasions by letter, and once personally, all of which were refused by the defendant." Unfortunately, neither the letters nor their contents are given or stated, nor who it was that made the personal demand of payment, and what was then said. Mr. Lansing likewise has failed to submit the correspondence with Mr. Church, the attorney for the defendant, or to state when or how the refusal of payment was made.

The defendant, on the other hand, swears flatly "that no claim or bill has at any time ever been presented to this deponent, although deponent admits by letter plaintiff requested his claim paid, which letter was dated April 8, 1882. That deponent never personally, or directly, refused to pay or allow said claim. * * That deponent defended the case in good faith, and for the interest of the estate as he believed."

Mr. Church, the attorney of the defendant, also deposes, that the "claim was never personally presented" to him,

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and that he appeared in the case at the request of the plaintiff's attorney, and that the case was defended "in good faith" and on his "advice," and he was "unaware of interest having been paid on the note."

It is impossible upon these facts to find that the payment of the note "was unreasonably resisted or neglected." Very clearly, if the testimony of the plaintiff, his daughter and counsel, had been given in open court, their general statements as to the result of interviews and correspondence would not have been received as evidence, and the embodiment of their inferences from interviews and letters in the form of affidavits does not make such inferences evidence, any more than if given in open court. The motion for costs then is denied, because there is no legal proof of the presentation of the claim of the plaintiff, after the granting of letters of administration to the defendant, and of its rejection by the defendant.

Assuming, however, that the defendant did decline to pay it, was it an unreasonable resistance of a claim, which was barred by the statute of limitations, unless there had been a payment thereon by the deceased whose estate the defendant represented, and of which he had no personal knowledge, to require the proof thereof to be submitted to a court in an action in which he voluntarily appeared, in order that no charge of want of fidelity to the estate could be made? If the defendant, while declining to admit the claim as valid, because he had no personal knowledge of the payments claimed by the plaintiff, had offered at once to refer the claim, which had been accepted, and the result had been a recovery by the plaintiff, it would not be urged that there had been an unreasonable resistance of payment. The case presented is not essentially different. The defendant, as he expressly testified upon the trial, was ignorant of the payments upon the note. If he admitted their existence without proof, he was in peril. Under such circumstances, while unwilling to admit the validity of a claim *prima facie*

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barred, he facilitates a suit, by voluntary appearance, brought to establish the demand. This was neither unreasonable nor improper, and the act should not subject either the defendant or the estate of the deceased to costs, the right to impose which only exists when the court can judicially see that the claim for which the action was brought "was unreasonably resisted or neglected."

This motion for costs and an extra allowance is denied, without costs. The plaintiff's attorney and counsel has earned all that our statute allows, but the payment thereof must be made by the plaintiff, and not by the defendant, nor the estate which he represents.

N. Y. COMMON PLEAS.

In the Matter of the Accounting of SCHLANG, assignee of
RAUTH & SON.

Practice in assignment cases — Commissions, costs and allowances to be made to an assignee who has not violated any duty, but is removed because his domestic relations are such as to make it probable that his feelings might conflict with his duty.

Where an assignee has violated no duty, but was removed because his domestic relations were such as to make it probable that his feelings might conflict with his duty, his commissions will be allowed.

The assignee's claim for rent, clerk hire and gas bills paid whilst the stock was selling at retail was properly disallowed. But it was proper to allow such expenses as were incurred in preparing the goods for sale at auction.

It is the duty of the assignee to defend the trust, and to preserve the assigned estate, and it is proper to allow him the amount payable to his counsel for services in a replevin suit.

Where difficult questions arise an assignee may lawfully employ counsel to advise him in relation to the administration of the estate, and charge the expenses to the trust fund.

If a trustee or assignee has good ground for retiring, the costs of the suit by which he seeks and obtains a discharge from his trusteeship will be paid out of the trust fund.

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Where, as in this case, an assignee without any fault on his part, is called upon to vacate his office, he stands in the position of one who voluntarily and for good cause seeks to be relieved from his trusteeship. With respect to the expenses of his accounting, he should be treated like a trustee, who, for good reason, and of his own accord, asks leave to lay down his office.

The assignee should not be allowed a payment made of a gas bill which was contracted for by the assignors and was a claim against the assigned estate. Not being a preferred claim, only a *pro rata* portion should have been paid. He should on the final accounting of the substituted assignee be entitled to reclaim the amount which, on a *pro rata* payment to creditors of the non-preferred class would be coming to the gas company.

The costs to be allowed on an accounting of an assignee are such costs as would be awarded on the trial of an issue of fact in a civil action, that is to say, for proceedings after notice and before trial, and the usual trial fee.

Special Term, December, 1883.

VAN HOESEN, J. — In the case of *Halsy agt. Van Amring* (6 Paige, 12) the chancellor did not deem it necessary to pass upon the question as to whether the court of chancery could disallow commissions where an executor or administrator had fraudulently mismanaged the estate, but he did decide that commissions could not be disallowed by a surrogate, who is an officer of limited powers, and who, to use the language of the chancellor, “takes no power “by implication.” The duty of the surrogate is to obey the statute, which requires him to allow to executors and administrators specified commissions for their services. The allowance to an executor of his commissions is held to be not a matter of grace but of right, even though by his misconduct he should have subjected himself to liability for compound interest (*Rapelye agt. Hall*, 1 Sandf. Ch., 406), or though he should have been guilty of gross negligence (*Meacham agt. Stearns*, 9 Paige, 405).

The powers of the court of common pleas are not limited as are those of the surrogate, for by section 25 of the assignment act it possesses, in all proceedings arising under that act, “the powers of a court of equity in reference to the trust and

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any matters involved therein." These powers in many cases may be exercised, though a formal action corresponding to a suit in equity be not pending. But it is not necessary now to determine whether or not the court will or can withhold the commissions of an assignee who has violated his trust. In the case of *Marquand* (57 *How. Pr.*, 477) the assignee had in fact got in the whole of the assigned estate, and then had used the moneys in his hands for the purchase for his own benefit of claims against the estate. Of course I refused to allow him commissions upon moneys laid out by him in buying claims. A surrogate could properly have withheld commissions upon moneys expended under similar circumstances. The moneys were not paid out within the meaning of the law, they were misappropriated and used by the assignee for his private speculations. In this case, however, Schlang, the assignee, has violated no duty. He was removed, as appears by the decision of chief justice DALY, because his domestic relations were such as to make it probable that his feelings might conflict with his duty. The chief justice said that the removal should be made under the principle established by the *Burnett case*, which was a case in which the assignee had been the attorney and confidential adviser of the assignor's wife, and employed by her to collect a claim which, if paid, would have absorbed a large part of the assigned estate. The validity of the claim was disputed by creditors, and though nothing inconsistent with honor and duty had been done by the assignee it was held to be better that the assignee should not be a person whose bias at least was in favor of the wife and against the other creditors (*In re Cohn*, 20 *Alb. L. J.*, 352).

It is insisted, however, by Mr. Severance, who represents some creditors, that as he made a number of charges against Schlang, and as a removal followed, we must assume that all the charges have been established as *res adjudicata*, notwithstanding the decision of the chief justice, which declared that the case presented was within the principle of the *Burt-*

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nett case. No such inference can be drawn. The truth of Mr. Severance's charges has never been passed upon, and it would be the grossest injustice to assume that Schlang had been found guilty of fraud or misconduct, and to subject him to the punishment that might, perhaps, follow such an adjudication. The referee was right in allowing Schlang his commissions.

Second. The referee properly disallowed the assignee's claim for rent, clerk hire and gas bills paid whilst the stock was selling at retail. It was proper, however, to allow such expenses as were incurred in preparing the goods for sale at auction. Rule 20, court common pleas, requires that the sale shall be advertised for at least ten days, in one or more newspapers, and that the goods shall be sold in parcels, according to a printed catalogue. The arranging of the goods in parcels, and the preparation of the catalogue required time; and it would not be improper for the assignee to retain possession of the store, and to employ assistants, if the assorting and the cataloguing of the goods could be done better there than in an auction room.

Third. It was proper to allow the assignee the amount payable to his counsel for services in the replevin suits. It was the duty of the assignee to defend the trust, and to preserve the assigned estate from attack (*Noyes agt. Blakeman*, 6 N. Y., 579, 584).

Fourth. Where difficult questions arise, an assignee may lawfully employ counsel to advise him in relation to the administration of the estate, and charge the expenses to the trust fund (*Jewett agt. Woodward*, 1 Edw. Ch. R., 200; *Lery's Accounting*, 1 Abb. N. C., 177; *Bishop on Insolvent Debts*, sec. 378). The exceptioner has not pointed out that in the \$458.36 allowed to the assignee as payments to his counsel, any sums were included that were not properly chargeable against the estate.

Fifth. It is said that Schlang should not be allowed the fees paid to the referee on this accounting. If Schlang had

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been removed for misconduct, or if he had capriciously refused longer to serve, the objection would be a good one. The rule is that if a trustee has good ground for retiring, the costs of the suit by which he seeks to obtain a discharge from his trusteeship will be paid out of the trust fund (*Adams on Equity*, m. p. 39, citing *Coventry* agt. *Coventry*, 1 *Keen*, 758; *Greenwood* agt. *Wakeford*, 1 *Beav.*, 581; *Forshaw* agt. *Higginson*, 20 *Beav.*, 486; *Gardner* agt. *Doones*, 22 *Beav.*, 395; *Carter* agt. *Seabright*, 26 *Beav.*, 376; *Hill on Trustees*, m. p. 189). In this case Schlang, without any fault on his part, was called on to vacate his office, and he stands, therefore, in the position of one who voluntarily, and for good cause, seeks to be relieved from his trusteeship. There was no impropriety in his accepting the assigneeship, nor has he since done anything that can be called misconduct. The delicacy of his position occasioned his removal. As was said by the court of appeals in the *Burnnett* case, the words "misconduct" and "incompetency," as used in the assignment act, have no technical meaning, and were intended to embrace every conceivable cause which a court of equity might deem adequate for the removal of a trustee. I repeat, that I think Mr. Schlang is, with respect to the expenses of his accounting, to be treated like a trustee who, for good reason and of his own accord, asks leave to lay down his office.

Sixth. It is next objected that Mr. Schlang should not be allowed the payment made of a gas bill for twenty dollars and fifty cents for the period beginning December 23, 1878, and ending January 23, 1879. This bill was, it appears, contracted by the assignors, and was a claim against the assigned estate. Not being a preferred claim, only a *pro rata* portion should have been paid. The gas company must share with the other creditors of the non-preferred class; and Mr. Schlang must account for and pay over to his successor the amount paid to the company. He will, on the final accounting of the substituted assignee, be entitled to reclaim the amount which, on

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a *pro rata* payment to creditors of the non-preferred class, would be coming to the gas company.

Seventh. The exception to the allowance of \$150, to the assignee as the fee of his attorney for drawing off the accounts, and attending at the accounting, should be sustained. The case of *Burtis* agt. *Dodge* (1 *Barb. Ch. R.*, 91), suggests the true rule. We have not construed section twenty-six of the assignment act as giving us the right to arbitrarily allow costs and counsel fees, limited only by the court's discretion (*See the Matter of Risley* agt. *Clifford E. Smith*, assignee of *Risley*, *C. P.*, special term, February, 1880).

Though the accounting is not a special proceeding, and is not governed by chapter 270, Laws of 1854, and though we are not controlled by any statute fixing the amount of costs and counsel fees, there is so much force in the suggestions of the chancellor, in *Halsey* agt. *Van Amringe* (6 *Paige*, 17, 18, 19), that I am in favor of adopting his reasoning, and of holding that the costs to be allowed on an accounting are such costs as would be awarded on the trial of an issue of fact in a civil action; that is to say, for proceedings after notice and before trial, and the usual trial fee. There must be either an unlimited discretion in awarding costs and counsel fees, or else a settled rate conformable to some fixed standard. The only standard known to me is the bill of costs established by the Code, and to that I think we must conform (*See* 55 *N. Y.*, 146).

The allowance of \$150 should be reduced to fifteen dollars, for proceedings after notice and before trial; for each party served with notice to appear before the referee, not exceeding ten, two dollars, and for each party so served in excess of ten in number, one dollar; for trial of an issue of fact, thirty dollars; if more than two days occupied, in addition, ten dollars.

If the words "reasonable counsel fees" can be construed to mean an extra allowance, I know of no basis upon which such an allowance could, in this case be computed.

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The foregoing observations dispose of all the exceptions filed to the referee's report. The argument of the counsel for the exceptioners is, in some respects, broader than the exceptions, but the court cannot pass upon matters as to which no exceptions have been filed, and which one counsel chooses to argue without notice to his adversary.

With the modifications suggested in this opinion, the report of the referee will be confirmed.

SUPREME COURT.

JULIUS MARCELE agt. AUGUSTE SALTZMAN, as executor, &c.

Practice — Service of orders to show cause irregular when made by mail though received within the time limited for service — Code of Civil Procedure, sections 797 and 798.

An order to show cause which provides that service of a copy on the plaintiff's attorney two days before the return day thereof shall be deemed sufficient service requires *personal service* on the attorney.

To make service by mail regular, under sections 797 and 798 of the Code of Civil Procedure, the order must provide for service by mail.

The fact that the papers were *received* more than two days before the return day does not cure the defect.

Oneida Special Term, Utica, January, 1884.

ON December 10, 1883, two orders to show cause — one to file security for costs; the other to furnish a further bill of particulars — were granted to the defendant by one of the justices of this court in the second department, both returnable at a special term to be held at Utica, December 15. Each order providing as follows: "Further ordered, that service of a copy of this order on plaintiff's attorney, two days before the return day thereof, shall be deemed sufficient service."

The proof of service was that the orders to show cause, with the affidavits on which they were founded, were served

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on the attorney of the plaintiff, who lived at Carthage, Jefferson county, on December 10, by mailing copies to him at his address.

The plaintiff not appearing on the return day, the orders sought under the rules to show cause were granted by default. January 8, 1884, the plaintiff, on notice, moved to vacate the orders for irregularity. In the affidavit for this motion the attorney of the plaintiff stated that the two sets of motion papers were never served on him except by mail; that they were taken by him from the post-office on the morning of December 12, 1883.

William Kernan, for plaintiff.

A. H. Ely, for defendant.

MERWIN, *J.* — The orders to show cause required two days' service on plaintiff's attorney. This, upon its face, meant personal service, as service by mail was not specified (18 *Barb.*, 393).

It is, however, claimed that under section 798 of Code of Civil Procedure it was regular to serve by mail, double the time being given. That section allows such service in cases where, in the Code or in the general rules of practice, a time is specified for doing of an act requiring notice.

In the present case the time is only specified in the order to show cause, and that does not provide for service by mail. In my opinion service by mail was not regular; still the papers were, in fact, received more than two days before the return day and were not returned. The receiving in time has been held to be important in some cases (*Hurl* agt. *Davis*, 13 *How.*, 57, 59; *Schenck* agt. *McKie*, 4 *How.*, 246). The plaintiff's attorney shows a good excuse for not appearing to contest the motions. The orders, or one of them at least, is of that character that the party should have the opportunity to put in his defense to it.

Upon the whole I think the orders of December 15, 1883,

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should be vacated without prejudice to a renewal of the motions. Costs of this motion to abide the event.

Ordered accordingly.

NOTE.—The case cited from 18 *Barbour*, 393 (*Rathbone* agt. *Acker*), was one where a statute provided that if an owner neglected to construct a sidewalk “for ninety days after notice thereof to be served on such owner or his agent,” &c.; and it was *held*, “where a statute requires service on a person it means personal service unless some other service is specified or indicated! *Quære*, what application has that decision to this case. And is not some other than *personal* service specified or indicated in sections 796, 797 and 798 of the Code of Civil Procedure. The order to show cause is, in effect, but a notice of motion (*Pitt* agt. *Davidson*, 37 *N. Y.*, 242). *Hurd* agt. *Davis* (13 *How.*, 57), and *Schenck* agt. *McKie* (4 *How.*, 245), would seem to be cited only to overrule them. In each of these cases the papers were mailed *at* the wrong post-office. In the first case *HARRIS, J.*, says: “Had the answer in fact reached the attorneys in time it might have been treated as a good personal service from that time;” and the decision in the second case is of like import. In *Gross* agt. *Clark* (1 *Code Civil Pro.*, 17, *decided in general term, first department, January, 1881*), the court *held* that if the manner of service of an order was irregular the irregularity was cured and the service became complete from the time it reached the attorney’s hands, and that service of a copy of an order (except in contempt proceedings) on the attorney without exhibiting the original was regular. The Code having prescribed the manner of service, has the judge in granting orders to show cause power to vary the manner. Can he do more than direct that less than eight days notice shall be sufficient. If the law requires personal service can the order make service by mail sufficient, *quære*.—[ED.]

N. Y. SUPERIOR COURT.

HENRY LEE agt. MARY LEE.

Action to annul a marriage — Alimony and counsel fees allowed in such class of actions.

Title 1, chapter 15 of the Code of Civil Procedure, does not change articles 1, 2, 3, 4 and 5 of title 1, chapter 8, part 2 of the Revised Statutes, and as alimony and counsel fees were allowed in an action to annul a marriage while those portions of the Revised Statutes were in force,

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that power still continues under the Code of Civil Procedure (*Henkel* agt. *Henkel*, special term decision of this court, *INGRAHAM, J.*, decided in November, 1883, not followed; *Sullivan* agt. *Sullivan*, special term, decision of this court, *O'GORMAN, J.*, decided in October, 1883, followed).

Special Term, December, 1883.

MOTION for alimony and counsel fee by the defendant, who is the wife of the plaintiff.

Henry Lee brought this action against Mary Lee "to annul and declare void their marriage," upon the alleged ground of "fraud, force and duress" on the part of the wife. The answer admits the marriage, but denies the alleged "fraud, force and duress."

J. C. Julius Langbein, of counsel for the defendant and in support of the motion, made and argued the following points: First. Under the issues raised by the complaint and answer, irrespective of the moving papers, the wife is entitled to alimony and counsel fee *pendente lite*. The motion is resisted on the broad ground of want of jurisdiction in the courts to grant the relief asked for in an action of this character, and to sustain this position the plaintiff's attorney relies on two cases, viz., *Ramsden* agt. *Ramsden* (28 *Hun*, 285), affirmed by the court of appeals in 91 *New York*, 281, and *Henkel* agt. *Henkel* (special term decision of this court, *INGRAHAM, J.*, filed November 26, 1883). It is respectfully submitted that the *Ramsden* case is not in point, and that the *Henkel* case is in conflict with *Sullivan* agt. *Sullivan*, heard before *O'GORMAN, J.*, and decided by him October 24, 1883. If *Henkel* agt. *Henkel* is good law the courts will soon be flooded with actions brought by husbands against their wives upon the ground of "force, fraud and duress," and yet no relief be afforded the wife in the nature of alimony and counsel fee to enable her to exist, and particularly to defend the action brought against her. Lawyers will refuse to defend the wife, or reputed wife, unless the husband, or reputed husband, is at least compelled to pay a counsel fee pending the

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action. There was no power in the courts to allow alimony and counsel fee in the *Ramsden case*, because no such action as was brought in that case is known to the law. Judge DANIELS, who writes the opinion at the general term, says: "The action has not in general terms been brought either for an absolute divorce or a separation of these parties, but its object as stated in the complaint is 'to obligate the defendant to pay to the plaintiff a certain sum for her maintenance and support sufficient to enable her to live and maintain her proper condition in life as the lawful wife of the defendant.'" * * * And judge DANFORTH, in writing the opinion, says: "The difficulty of the plaintiff's case is that the action brought by her is not such an action as the statute authorizes. It is not an action to procure a judgment of separation. No separation is asked for, and it is apparent that the omission in this respect was intentional. The plaintiff seeks maintenance and support, nothing more." * * * In other words, these judges say that no such action is allowed by law. But the *Henkel case* and this case are actions allowed by law, and therefore the *Ramsden case* does not apply to these cases, so that the decision of judge INGRAHAM in the *Henkel case* must have been based on some other ground. In a short memorandum of opinion the judge gives the reason. He says: "This action is to avoid a marriage not for a divorce. Motion denied, no costs." But with all respect to the learned justice it is respectfully submitted that because the action is brought to avoid a marriage is no reason why alimony and counsel fee should not be granted. The only cases reported in the books where alimony and counsel fee was refused in an action for nullity of marriage are *Bartlett agt. Bartlett* (1 *Clark's Ch.*, 322); *Bloodgood agt. Bloodgood* (59 *How.*, 42). Both of these actions were brought by the wife against the husband. The first case has never been followed, and in the second the court denies the motion on the ground that the wife is the plaintiff, but states distinctly that if the action had been brought by the husband it would have

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followed the case of *North* agt. *North*, which will be hereafter referred to. *Bartlett* agt. *Bartlett* has never been followed, neither has *Bloodgood* agt. *Bloodgood*. Vice-chancellor WHITTELSEY, in the case of *Bartlett* agt. *Bartlett*, denied the wife's motion for alimony and counsel fee in a case where all his sympathies from the facts were against the application, and held that the statute applied only to cases of suits for divorces or for separations. No other judge or court has ever followed him except in *Bloodgood* agt. *Bloodgood*, and as already shown, the judge in that case would have granted the motion had it been made in an action brought by the husband. A careful review and proper criticism of the *Bartlett* case will be found in the case of *Allen* agt. *Allen* (59 *How.*, 30, &c.). In *Allen* agt. *Allen* which was a suit brought by the wife, the husband was adjudged guilty of contempt for non-payment of alimony and counsel fee ordered, and locked up in jail, and on a motion for his release it was denied and an opinion written by judge DANIELS (*See this case reported in 8 Abb. N. C.*, 175, &c.; also 58 *How.*, 381). The case of *North* agt. *North* (1 *Barb.*, 241), decided by chancellor WALWORTH in 1845, after the case of *Bartlett* disposes of the erroneous reasoning of the vice-chancellor, and has been followed ever since and is good law to day. Judge INGRAHAM's attention could not have been drawn to this case or the cases which follow it. If it had, it is fair to say the learned judge would have said something about it or in relation thereto. In that case the bill was filed by the husband to annul his marriage with the defendant and she made the motion for alimony and counsel fee, so that the case is on all fours with ours. The chancellor says: "For the purposes of this application the fact of the marriage is admitted, and the presumption is that it was legal until the contrary shall have been established by the proofs in the cause." The chancellor then shows the difference and the reason for it when the wife is the complainant, and puts it upon the ground that in such a case the allegations by her of the illegal marriage will be taken as

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true as against herself, but where the husband files a bill against his wife, admitting that he was in fact married to her, but which marriage he alleges to have been illegal and void, the wife is entitled to alimony and counsel fee at least until the truth or falsehood of his bill can be ascertained on the trial. The chancellor then says (and this is the main point in the case): "It is true the provision of the Revised Statutes, on the subject of an allowance to the wife to enable her to carry on the suit is confined to suits brought for a divorce or a separation, and does not in terms extend to the allowance of *ad interim* alimony, even in those cases (2 *R. S.*, 148, *sec.* 56.) But by referring to the revised note to that provision, it will be seen that the allowance does not depend wholly upon the statute but upon the practice of the court as it previously existed. And even subsequently to that statute this court has continued to allow *ad interim* alimony in matrimonial cases, in the same manner as before. AYLIFFE says a husband, regularly speaking, is bound to allow his wife alimony pending the suit, whatever the cause may be. POYNTER also lays down the rule generally, that in all suits of divorce, or suits for the restitution of conjugal rights, or in suits of nullity, if the nullity be promoted by the husband, as soon as the court is judicially informed that a fact of marriage has taken place, it is competent for the wife to apply for alimony pending the suit." * * * This case has been followed in *Ford* agt. *Ford* (10 *Abb. [N. S.]*, 74, 78; *see language of judge MORRELL at page 78 referring to the North Case; S. C.*, 41 *How.*, 169, 172); *Allen* agt. *Allen* (59 *How.*, 27); *Bloodgood* agt. *Bloodgood* (59 *How.*, 42, 43), and it is recited and applied in *Brinkley* agt. *Brinkley* (50 *N. Y.*, 184, 190). In *Griffin* agt. *Griffin* (47 *N. Y.*, 135) the court said, at page 136: It is conceded that there is no statute, in terms authorizing the order, and that if sustained, it must rest upon the incidental powers formerly vested in the court of chancery in cases of this description, and to which the supreme court has succeeded. On page 137 the court says: "It has been the constant prac-

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tice of the court of chancery, both before and since the Revised Statutes to make equitable provision for all these matters, and in so doing it has been guided by the decisions of the ecclesiastical court of England in similar cases" (See *Allen* agt. *Allen*, 59 *How.*, 39, &c.). In the *Brinkley* case (page 193) judge FOLGER says, after citing numerous authorities: "At all events, the authorities cited are ample to sustain this proposition; that where there has been a marriage in fact, though its commencement was not according to the decent and recognized forms and ceremonies usual in society, and which, though not indispensable for its validity, are yet sanctioned by law; in an action by the wife for divorce, or by the husband for a decree that the marriage is null, in which the putative wife avers the existence and legality of the marriage, though the alleged husband denies it; the court may, in its discretion allow to the putative wife temporary alimony and money to carry on the action from the means of the alleged husband." The court is asked to read the language of judge FOLGER on the same page, as to the principle involved in this language. At page 200, judge FOLGER says: "And though the statute (referring to the Revised Statutes) does not, in terms, give to the court the same power as to an allowance for her support and maintenance pending the controversy, yet this power is based upon the general equitable jurisdiction of the court, and upon the ground that when the statute conferred jurisdiction upon the court in those actions for divorce, which, by the English law, are solely cognizable in the ecclesiastical courts, the grant of that jurisdiction carried with it, *by implication*, the incidental powers which were indispensable to its proper exercise, and not in conflict with our own statutory relations on the same subject (see *Griffin* agt. *Griffin*, 47 *N. Y.*, 134), where this subject is elaborately considered." In *Kinsey* agt. *Kinsey* (7 *Daly*, 460), which was an action by a husband against his wife to annul the marriage, the rule was laid down as follows, following the ruling in the *Brinkley* case, "that alimony would

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not be allowed, unless the existence of the material relation be proven to the satisfaction of the court, for the right to alimony depends upon that relation." Thus showing that when such a fact is presumptively proven (see answer in this case admitting the marriage) alimony and counsel fee will be granted, and, also, that there is ample power in the court to do so. As has already been shown in the *North case* (at page 244), chancellor WALWORTH says that, "by referring to the reviser's notes it will be seen that the allowance does not depend wholly upon the statute, but upon the practice of the court, as it previously existed." If the Revised Statutes were not in conflict with the incidental powers of the court as stated by judge FOLGER in the *Brinkley case*, the Code of Civil Procedure (*sec.* 1769), which takes its place (*sec.* 58 of the *Revised Statutes*), certainly is not, and if this is so, the power is still vested in the court as heretofore. The allowance still does not, therefore, depend wholly upon the Code of Civil Procedure, but upon the practice of the court as it previously existed. Mr. Throop, in his note to this section, says that it is section 58 of the Revised Statutes extended, and that "it is believed that the section is so framed as not to affect the disposition, either rightly or erroneously, of such extraordinary cases as *Brinkley agt. Brinkley* (50 *N. Y.*, 174); and *Anonymous* (15 *Abb. [N. S.]*, 307). The *Brinkley case* has already been noticed, and in the other case *Anonymous*, we find not only aids us considerably in our position, but the language of the court is directly in point, both in the law and as matter of judicial discretion. Judge DAVIS in that case says: "The court is authorized in every suit brought for divorce, or separation, to require the husband to pay a suitable sum to enable the wife to carry on the suit. No distinction is made between a suit for divorce upon the ground of nullity of the marriage, or for any other cause, all are denominated divorces or separation." In that case the third wife applied for leave to intervene as a party to enable her to protect her right, and for alimony and counsel

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fee. The action was brought by the husband to annul a marriage. Alimony was denied the third wife on the ground that she was not a party to the action, but counsel fees were allowed her. The court said, at page 310: "In this effort she is plainly entitled to have the services of counsel, and it is obviously proper that the plaintiff, who has placed himself in the relation of husband to her, in fact, should pay for the service which his act has made necessary. It is a part of the burden and expense which the law casts upon him. He seeks to show that this lady is not his wife." * * * "Having assumed the obligations of a husband he ought to be held to the rule imposing the burdens of a husband, at least, until he establishes the fact that he is not. If she was still a party to the present suit, she would be entitled to both alimony and counsel fee." With regard to the question under consideration, viz., the power of the court to grant alimony and counsel fee in actions to annul a marriage, there is practically no difference between the Revised Statutes and the Code of Civil Procedure (*See Allen agt. Allen*, 59 *How.*, 30). The Revised Statutes read (*chap. 8*): Of the domestic relations. The Code of Civil Procedure reads (*chap. 15*): Special provisions regulating other particular actions and right of action, and actions by or against particular parties. Title 1, "Matrimonial actions." Under the Revised Statutes, title 1 read, "Of husband and wife." These two titles or headings do not conflict, they both relate to marriage. The other titles of the Revised Statutes, under chapter 8, are as follows: Title 2. Of parents and children. Title 3. Of guardians and wards. Title 4. Of masters, apprentices and servants. The other titles of the Code of Civil Procedure (*chap. 15*), are as follows: Title 2. Actions relating to a corporation. Title 3. Actions relating to the estate of a decedent. Title 4. Other special actions and rights of action. Title 5. Other actions by or against particular parties. Under the Revised Statutes (*title 1*), headed, "Of husband and wife," has seven articles. Under the second, under which our cause of action comes, is headed

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"Of divorces on the ground of nullity of the marriage contract." Under the Code of Civil Procedure (*title* 1), is headed "Matrimonial actions," has four articles, under the first of which our cause of action comes. It is headed "Action to annul a void or voidable marriage." These headings or titles are identical; they certainly do not conflict; while as to the other titles in both the Revised Statutes and the Code of Civil Procedure, other matters are contained, not relating to either "husband and wife," or "matrimonial actions." Section 1743 of the Code of Civil Procedure, (*subdivision* 4), takes the place of section 33 (*sec.* 20), subdivision 4 of the Revised Statutes, which read: 4. That the consent of one of the parties was obtained by force or fraud. While subdivision 4 of section 1743 reads: 4. That the consent of one of the parties was obtained by force, duress or fraud. The change consists in the addition of the word "duress." Following out this line of reasoning, the court will see that we come out the same as the practice previously existed, and that the court had the power now contended for. We first take the Revised Statutes, article fifth: General provisions applicable to the last two articles. What are the last two articles? Why, three and four, what are they? Article third: Of divorces, dissolving the marriage contract. Article fourth: Of separations or limited divorces. Section 57 of this article fifth reads as follows: "If a married woman, at the time of exhibiting a bill against her husband, under the provisions of either of the last two articles, she reside in this state, she shall be deemed an inhabitant thereof, although her husband may reside elsewhere." Section 58 reads as follows: "In every suit brought, either for a divorce or for a separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency; and it may decree costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court or in the hands of a receiver."

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We now take the Code of Civil Procedure and see what has become of article 5 and these two sections 57 and 58. Article fourth: Provisions applicable to two or more of the actions specified in this title. Section 1768, which takes the place of section 57, reads as follows: Section 1768. If a married woman dwells within the state when she commences an action against her husband, as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere." Section 1769, which, as has already been shown, takes the place of section 58, reads as follows: "Section 1769. Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion during the pendency thereof from time to time, make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs in favor of or against either party, and an execution may be issued for the collection thereof as in an ordinary case, or the court may, in the judgment or by an order made at any time, direct the costs to be paid out of any property sequestered or otherwise in the power of the court." Now, what are the last two articles referred to in these two sections? Why, two and three, what are they? Article second: Action for a divorce. Article third: Action for a separation. Precisely the same as in the Revised Statutes, and yet in neither there nor in the Code of Civil Procedure is it expressly or otherwise prohibited for the courts not to grant alimony and counsel fee in any of the actions mentioned, either in the other articles of the Revised Statutes, either three and four, or in the articles in the Code of Civil Procedure two and three. Nowhere does it say that the court may not or must not do so, and therefore the *North* agt. *North* and the *Brinkley* agt. *Brinkley*, and the other cases cited, are

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good law to this day even under the Code of Civil Procedure. Thus, to sum the question up in a few words, we find that in England the ecclesiastical courts had power under the common law in actions to annul a marriage, and actions of that nature, to grant or refuse alimony and counsel fee. This general equitable jurisdiction was vested in our court of chancery, and in turn in our supreme court, irrespective of any statute law, and the power to grant or refuse alimony and counsel fee in such actions was carried with it as indispensable to the proper exercise of justice by the court in such case. No power was vested in the ecclesiastical courts either by the common law or by statute in actions for divorce upon the ground of adultery nor for separation, and consequently no such power could be vested in our court of chancery unless specially conferred by statute through our legislature, so that when our statutes were passed authorizing divorces in these class of cases, provision was thereby expressly made vesting the court with power by express words to grant alimony and counsel fee, as has already been shown by section 58 of the Revised Statutes and by section 1769 of the Code of Civil Procedure. But in actions to annul a marriage, and those of that nature, the court of chancery having already that power by the common law, it was not necessary to expressly, by statute, vest them with a power they already had, at least none has since been expressly given to the court. Neither has it, expressly or otherwise, been taken away. By Rule 86 of the General Rules of Practice, "in case where no provision is made by statute or by these rules the proceedings shall be according to the customary practice as it formerly existed in the court of chancery or supreme court in cases not provided by statute or by the written rules of these courts. Where its own rules do not cover the case the court follows the practice of the king's bench in England (*Dubois agt. Philips*, 5 *Johns.*, 235; *Miller agt. Stettiner*, 7 *Bosw.*, 695; *S. C.*, 22 *How.*, 518). And, hence, judge FOLGER appropriately says in the *Brinkley case*, referring to the *Griffin case*, that "the

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grant of that jurisdiction (referring to the chancery court, to which the supreme court has succeeded) carried with it by implication the incidental powers which were indispensable to its proper exercise and not in conflict with our own statutory regulations on the same subject." Second. The court having the power to grant alimony and counsel fee in an action of this character (particularly where the husband is plaintiff) the defendant's motion should be granted and alimony and counsel fee allowed her at least until the court or jury have pronounced her not to be the wife of the plaintiff. 1st. The plaintiff by bringing the suit thereby admits that the defendant is his reputed wife to say the least. 2d. She admits the marriage in her answer. The existence of the marital relation by the pleadings alone is therefore proven to the satisfaction of the court (*See Kinsey agt. Kinsey, supra*). 3d. The defendant in her petition swears that the marriage set forth in the complaint was solemnized in the presence of one John McCormack. 4th. John McCormack, in an affidavit annexed to the petition, swears that he is a police officer attached to the Tombs police court; that he arrested the plaintiff on a warrant charging him, upon complaint of the defendant, with bastardy, and that while in his custody under said warrant the plaintiff asked him whether by marrying the girl (meaning the defendant in the action) "he could get out of the scrape," and upon receiving an affirmative answer he at his own request was taken to her residence. The officer ends his affidavit with the following forcible language: "Nothing showing or tending to show fraud or force was used by the defendant, as I was present and heard all the conversation between them, and said plaintiff informed me "that he married her of his own volition." 5th. In addition to all this the defendant swears she was delivered of a child of which the plaintiff is the father. 1st. By this marriage, therefore, he got out of the scrape, which consisted of seduction and bastardy, two serious criminal charges. 2d. The bastard child was thereby made legitimate. This then constitutes the alleged "fraud, force

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or duress." The plaintiff was in the strong clutches of the law upon a serious criminal charge; he certainly was morally bound to marry the defendant whom he had seduced and gotten with child out of lawful wedlock, and to avoid the legal consequences of his wrongful acts he voluntarily (though under the terror of the law) married the girl, and now he asks a court of equity to set aside the marriage and free him from his own voluntary act. The court may do so when the allegation of his complaint have been found to be true after a trial on the merits, but in the meanwhile surely the court will not refuse this defendant alimony and counsel fee, the one for the support and maintenance of herself and her child, the other to enable her to defend the action which under such circumstances the plaintiff has brought against her.

Rufus F. Andrews, attorney for the plaintiff, in opposition to the motion, claimed that the only provision made by law for the granting of alimony to a wife is made under section 1769 of the Code of Civil Procedure. This provides for granting alimony and counsel fee under articles 2 and 3 of title 1 of chapter 15 of the Code. Actions under these articles are for absolute and limited divorce and not for anything else. This action is to annul a marriage for fraud and is under article 1 of the same title and chapter, and cited the cases of *Ramsden* agt. *Ramsden* (2 *N. Y. Civil Code Reporter*, 416); *S. C.* (28 *Hun*, 285; affirmed in 91 *N. Y.*, 281), and *Henkel* agt. *Henkel* (*special term*, INGRAHAM, J., November, 1883).

TRUAX, J. — Title 1 of chapter 15 of the Code of Civil Procedure is substantially the same as articles 1, 2, 3, 4 and 5, of title 1, chapter 8, part 2, of the Revised Statutes. Alimony and counsel fee were allowed the wife in an action to annul a marriage, and when the action was brought by the husband while those portions of the Revised Statutes were in force. In *North* agt. *North* (1 *Barb. Ch.*, 241), the

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chancellor said: "The provisions of the Revised Statutes are the subject of allowance to the wife to enable her to carry on the suit is confined to suits brought for a divorce or separation, and does not in terms extend to the allowance of *ad interim* alimony even in those cases. But the allowance does not depend wholly upon the statute, but upon the practice of the court as it existed prior to the enactment of the Revised Statutes." This case was cited with approval by the court of appeals in *Griffin* agt. *Same* (47 N. Y., 137), and *Brinkley* agt. *Same* (50 N. Y., 190). In the last case the principle upon which alimony and counsel fee were allowed was stated as follows: "When an actual marital relation has been admitted or shown, and its existence in law is sought to be avoided by some facts set up by the husband, and it devolves upon him to show that fact, alimony will be granted until that fact is shown."

Alimony of five dollars per week and a counsel fee of twenty-five dollars is awarded.

SUPREME COURT.

LOUIS SMADBECK agt. GEORGE H. SISSON and JOHN J. SAFELY.

Attachment—In what actions a warrant of, may be granted—What must be shown to procure the warrant—Code of Civil Procedure, sections 635–636—When attachment should be set aside because of insufficiency of the affidavit upon which it was granted.

Upon the application of the plaintiff, an attachment was issued against the defendants upon an affidavit which stated that "the defendants are justly and truly indebted unto this plaintiff in the sum of \$20,000 lawful money of the United States, over and above all counter-claims known to this plaintiff, for damages, for the breach of a contract, express or implied, other than a contract to marry, founded upon the following facts, to wit: For work, labor and services done and performed, and caused to be done and performed, by the plaintiff to and for said defendants, and at the special instance and request of the

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defendants, in consideration that the defendants had agreed and undertaken to pay to plaintiff therefor whatever said work, labor and services were reasonably worth, and which work, labor and services consisted in the examination, location and reporting on mines and mining property located in Arizona, and in which the defendants claim to have an interest, and in obtaining for the defendants lands, vesting in them a lawful title and interest in certain mines and mining property in Arizona, and in work for them in his (plaintiff) profession as a mining engineer; that said work, labor and services were reasonably worth the sum of \$20,000; that no part thereof has been paid, but that the sum of \$20,000 is justly due and owing from the defendants to the plaintiff over and above all counter-claims known to him. Said work, labor and services were performed during a period from September 1, 1882, in Arizona, to the time of the commencement of this action." The affidavit then sets out the defendant Sisson resides in California and the defendant Safely in Indiana.

Held, that the affidavit fails to show that there has been a breach of the alleged contract between the plaintiff and the defendants, and the attachment should be vacated.

At Chambers, December, 1883.

Morris Goodhart, attorney for plaintiff.

Stern & Myers, attorneys for defendants, for the purpose of this motion only.

LAWRENCE, J. — The Code of Civil Procedure authorizes the granting of a warrant of attachment against the property of a defendant where the action is for breach of a contract, express or implied, other than a contract to marry, and the facts required by section 636 of the Code are shown to the satisfaction of the judge granting the same by affidavit (Code, secs. 635, 636). It is objected in this case that the warrant was improperly issued, because no breach of contract is shown by the affidavit on which the warrant was granted. That affidavit states that "the defendants above named are justly and truly indebted unto this plaintiff in the sum of \$20,000 lawful money of the United States, over and above all counter-claims known to this plaintiff, for damages, for the breach of a contract, express or implied, other than a contract to marry, founded

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upon the following facts, to wit: For work, labor and services done and performed, and caused to be done and performed by the plaintiff to and for said defendants, and at the special instance and request of the defendants, in consideration that the defendants had agreed and undertaken to pay to plaintiff therefor whatever said work, labor and services were reasonably worth, and which work, labor and services consisted in the examination, location and reporting on mines and mining property, located in Arizona, and in which the defendants claim to have an interest, and in obtaining for the defendants lands, vesting in them a lawful title and interest in certain mines and mining property in Arizona, and in work for them in his (plaintiff's) profession as a mining engineer; that said work, labor and services were reasonably worth the sum of \$20,000; that no part thereof has been paid, but that said sum of \$20,000 is justly due and owing from the defendants to the plaintiff over and above all counter-claims known to him. *Said work, labor and services were performed during a period from September 1, 1882, in Arizona, to the time of the commencement of this action.*" The affidavit sets out that the defendant Sisson resides in the state of California, and the defendant Safely in Indiana. On the plaintiff's affidavit there is no fact stated showing that there has been a breach of the alleged contract between the plaintiff and the defendants. The defendants, according to the plaintiff, were to pay him for his services such sum as the same were reasonably worth, and while it is alleged by him that the same were reasonably worth the sum of \$20,000, that such sum has not been paid, and that it is due to the plaintiff over and above all counter-claims, it also appears from the affidavit that the work, labor and services were performed during a period from September 1, 1882, to the time of the commencement of this action. This does not seem to me to show that there was a breach of their contract on the part of the defendants. No demand is alleged to have been made upon the defendants, nor any refusal to pay after such demand. No fact is stated from

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which the court can see that there has been a breach of the contract. The affidavit literally read means, that the suit was commenced simultaneously with the performance of the work, etc. The only evidence of the alleged breach is the plaintiff's own assertion of it. Besides, the defendants, where no time is specified as to the performance of a contract, are entitled to a reasonable time within which to perform. If the affidavit of the plaintiff is true, there was not an instant of time between the completion of the work and the commencement of the action. It has often been held that a mere recital of facts without a statement of their existence will not be sufficient in an affidavit on which a warrant of attachment is applied for (*See Manton agt. Poole*, 4 *Hun*, 638; *Pomeroy agt. Ricketts*, 27 *Hun*, 245; *Smith agt. Davis*, 29 *Hun*, 306). In the last case, justice DANIELS, in delivering the opinion of the court, uses this language in speaking of the requisites of an affidavit upon which the issuing of an attachment is sought: "A plain case must be made out, and where it is not, then it necessarily follows that the attachment must be set aside. This rule imposes no hardship upon the applicant for an attachment, for he is allowed to make out his case upon his own unsupported oath, and where the facts are such as will warrant him in making the statements required for this purpose, he should be obliged carefully and intelligently to embody them in the affidavit." Tested by these principles, the affidavit of the plaintiff appears to be insufficient, and I am, therefore, of the opinion that the motion to vacate the attachment should be granted. On the affidavits read upon the motion, I think that the weight of evidence is to the effect that Safely is a resident of this state, but the result at which I have arrived on the other branch of the motion renders it unnecessary to definitely decide that question.

Motion granted, with costs.

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SUPREME COURT.

EDWARD REILLY agt. GEORGE H. SISSON.

Attachment—When it should be vacated because of the insufficiency of the affidavit upon which it was granted.

Upon the application of the plaintiff an attachment was issued against the property of the defendant upon an affidavit made by the plaintiff, in which it was alleged that defendant was indebted to him in the sum of \$6,000, over and above all counter-claims, for damages for a breach of a contract, express or implied, and that such indebtedness arises upon the following facts: That at sundry times since April 1, 1883, up to and including this date, November 5, 1883 (upon which day the attachment was granted), the plaintiff, at the special instance and request of the defendant, loaned and advanced to him sums of money, amounting in all to the sum of \$6,000, which he promised and agreed to repay, but no part of which has been repaid:

Held, that the affidavit was insufficient; that if the affidavit is true a portion of the loan was made the day the attachment was issued, and therefore no proof of contract was shown and the attachment should be vacated.

At Chambers, December, 1883.

MOTION to vacate an attachment against the property of the defendant as a non-resident debtor.

The plaintiff in his affidavit on which the attachment was granted alleges that the defendant was indebted to him in the just and full sum of \$6,000, over and above all counter-claims, for damages for a breach of a contract, express or implied, other than a contract to marry, and that such indebtedness arises upon the facts stated; and the facts are these: That at sundry times since April 1, 1883, up to and including this date, namely, the 5th day of November, 1883, upon which day the attachment was granted, the plaintiff, at the special instance and request of the defendant, loaned and advanced to him sums of money, amounting in all to the sum of \$6,000, which he promised and agreed to repay, but no part of which has been repaid.

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Morris Goodhart, for plaintiff.

Stern & Myers, for defendant, for the purpose of this motion only.

LAWRENCE, *J.* — The affidavit on which this attachment was issued seems to me to be subject to the criticism which was made by the general term of this department upon the affidavit in *Smith* agt. *Davis* (29 *Hun*, 306); see, also, *Pomeroy* agt. *Ricketts* (28 *Hun*, 308). Again, if the affidavit is true a portion of the loan was made on the day the attachment was issued. Therefore I do not think that a breach of the alleged contract was shown (*See my opinion in Smadbeck* agt. *Sisson*, *ante*, 220.) See, also, generally as to the particularity required in stating the plaintiff's claim on an application for an attachment, *Skiff* agt. *Stewart* (39 *How. Pr.*, 385); *Ruppert* agt. *Haug* (87 *N. Y.*, 141).

The motion to vacate the attachment will be granted, with ten dollars costs.

SUPREME COURT.

LEWIS SMADBECK, appellant, agt. GEORGE H. SISSON and
JOHN J. SAFELY, respondent.

Attachment against a non-resident — Sufficiency of affidavit — When action prematurely commenced — Proof of notification that services were completed, and of demand and refusal to pay, necessary.

In an affidavit for an attachment in a suit to recover for work, labor and services, upon the ground of the non-residence of defendant, it appeared that on the very day the services were completed the action was begun. *Held*, that the action was prematurely commenced as the defendants were entitled to the whole of the day in which the services were completed to pay for their performance. There should also have been proof of notification to defendant that the services were completed, and of demand made and refusal to pay (*Affirming S. C.*, *ante*, 220.)

First Department, General Term, January, 1884.

Before BRADY and DANIELS, *JJ.*

Smadbeck agt. Sisson.

APPEAL from order vacating attachment against the property of non-resident debtors.

P. J. Joachimsen, for appellant.

Stern & Myers, for respondents.

BRADY, *J.* — The learned judge in the court below vacated the attachment granted in this case upon the ground that a cause of action was not clearly made out by the affidavit on which the attachment was predicated. The statement in the affidavit of the plaintiff is, that the defendants were indebted to him in a sum of money mentioned, over and above all counter-claims, and upon facts which he recited, namely, for work, labor and services done and performed, and caused to be done and performed, by and for the defendants, at their special instance and request, in consideration that they undertook to pay what the services were reasonably worth, and then stated of what the services consisted. He further alleged that the work and services thus indicated were reasonably worth the sum of \$20,000; that no part of it had been paid, and that the sum which they were reasonably worth was still due and owing from the defendants to the plaintiff, over and above all counter-claims. Then follows a statement that the said work, labor and services were performed during a period from September 1, 1882, to the time of the commencement of this action; so that the action was commenced at the time the services were complete.

It would appear from this statement that on the very day that the services were completed and all the obligations on the part of the plaintiff performed, the action was commenced. There is no statement of any notification to the defendants that the services were completed; no evidence of any demand having been made; no proof of any refusal to pay, and no statement of any fact from which the court could draw the inference that in this regard the right of action was complete on the day when the action was commenced. This

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element of the case was one of great importance in the consideration of the propriety of granting the attachment. It is discussed in an elaborate opinion by the justice in the court below, who arrived at the conclusion that there was no evidence of any breach of the contract, that there was no demand, and that there was no refusal to pay; therefore, that there was no fact stated from which the court could say there was a breach of the contract; that the affidavit literally read meant that the suit was commenced simultaneously with the performance of the work, and that the only evidence of the breach was the plaintiff's own assertion. And the judge further remarked that if the affidavit of the plaintiff was true, there was not an instant of time between the completion of the work and the commencement of the action.

The case of *Kiefer* agt. *Webster* (6 *Hun*, 526) is not in conflict with these views, because the allegation in that case was that the defendants were indebted to the plaintiffs in a sum named, for goods sold and delivered for which they had promised to pay but failed to do.

We think the disposition of the application was a proper one, and that the attachment should have been vacated as it was.

The order appealed from is therefore affirmed, with ten dollars costs and the disbursements of the appeal.

DANIELS, J. — The defendants were entitled to the whole of the day in which the services were completed to pay for their performance. The action was, therefore, prematurely commenced, and the attachment was properly set aside.

Reilly agt. Sisson.

SUPREME COURT.

EDWARD REILLY, appellant, agt. GEORGE H. SISSON,
respondent.

Attachment—When should be set aside because of the insufficiency of the affidavit upon which it was granted.

An affidavit on which an attachment was granted, which alleged that the defendant was indebted to him in a certain sum, over and above all counter-claims, for damages for a breach of a contract, express or implied. That the facts upon which such indebtedness arises are that at sundry times since April 1, 1883, up to and including November 5, 1883, which is the day the attachment was granted, the plaintiff, at the special instance and request of the defendant, loaned and advanced to him sums of money, amounting in all to the sum of \$6,000, which he promised and agreed to repay, but no part of which has been repaid:

Held, that the affidavit was insufficient; that no breach of the alleged contract was shown and the attachment should be vacated (*Affirming S. C., ante, 224*).

First Department, General Term, January, 1884.

Before BRADY and DANIELS, JJ.

APPEAL from an order vacating an attachment against the property of the defendant as a non-resident debtor.

P. J. Joachimsen, for appellant.

Stern & Myers, for respondent.

BRADY, J. — The plaintiff in this case, in the affidavit on which the attachment was granted, alleges that the defendant was indebted to him in the just and full sum of \$6,000, over and above all counter-claims for damages for a breach of a contract expressed or implied, other than a contract to marry, and that such indebtedness arises upon the facts stated; and the facts are these: That at sundry times since April 1, 1883, up to and including this date, namely, the 5th day of November, 1883, upon which day the attachment was granted, the plaintiff, at the special instance and request of the defendant, loaned and advanced to him sums of money amounting in all

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to the sum of \$6,000, which he promised and agreed to repay, but no part of which has been repaid.

It will appear, therefore, from the affidavit, that on the very day when some portion of the money was loaned to him, namely, the 5th day of November, 1883, when the affidavit was made, he had loaned and advanced money to him. As to what arrangement was made with regard to the repayment of the money, whether it was to be repaid instantly or at some time in the future agreed upon by the parties, whether any notification to repay the money so alleged to be advanced to the defendant was given him, and whether he had any information at all on the subject is not alleged. Nor is it stated that any demand was made upon him on the date that the suit was commenced, for the money which is asserted to have been loaned and advanced. There is, in other words, nothing to show that as to the money at least that was advanced upon the day that the attachment was granted, there was any breach of the contract to pay. It is not reasonable to suppose that the money advanced upon the fifth of November was to be paid on the fifth of November, in the absence of any allegation to the contrary. The learned judge in the court below therefore regarded the affidavit as one which was subject to the criticism made upon the affidavit in the case of *Smith agt. Davis* (29 Hun, 306); and *Pomeroy agt. Ricketts* (27 Hun, 242), and this was a correct view of the subject.

In the case of *Pomeroy agt. Ricketts* (*supra*), the court said that it was indispensable to show that a cause of action existed before the right to an attachment could be made to appear, and that no hardship was imposed upon the plaintiff, who was allowed to prove this fact by his own affidavit, in requiring that it should be made out with a reasonable degree of clearness, and that the plaintiff must certainly be required to show that he has a demand upon which the defendant has become legally liable for the recovery of judgment against him, before a cause of action could be made to appear. And

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in the case of *Smith* agt. *Davis* (*supra*), the court said: "To entitle the party to make such a seizure under an attachment before his right to appropriate the defendant's property has been established by evidence, reasonable and satisfactory proof is required. A plain case must be made out, and where it is not, then it necessarily follows that the attachment must be set aside." And the learned judge in the court below said that if the affidavit was true upon which the attachment was granted, a portion of the loan was made on the day the attachment was issued. He might have added that not only was the loan made upon that day, but the money advanced, because, as we have seen, the language of the affidavit is that at sundry times from the 1st of April, 1883, up to and including the fifth of November, which was the date of the affidavit, the plaintiff loaned and advanced to the defendant cash. And the learned justice also said: "Therefore I do not think that a breach of the alleged contract was shown."

The case of *Kiefer* agt. *Webster* (6 *Hun*, 526) seems to be, but is not, in conflict with these views, because the allegation in that case was that the defendants were indebted to the plaintiffs in a sum named for goods sold and delivered, for which they had promised to pay but failed to do so. The time of the delivery is not stated, and it may be assumed that the promise was made after the delivery on demand. In reference to that case it must also be said the rule adopted was very liberal and should not be extended, particularly since the subsequent cases, to which reference has been made, have weakened its authority. It must be confined to cases, if it be held yet to be controlling, of a precisely similar character.

For these reasons it is thought that the judge in the court below was right in the disposition he made of the application to vacate the attachment; that the attachment should not be held, and that, on the contrary, it should have been vacated, as it was.

The order appealed from is therefore affirmed, with ten dollars costs and the disbursements of the appeal.

Scheu agt. Lehning *et al.*

SUPREME COURT.

CHARLOTTE L. SCHEU, appellant, agt. F. LEHNING *et al.*,
respondents.

*Partition — Action for, when cannot be maintained — Code of Civil
Procedure, section 1533.*

An action for partition cannot, under section 1533 of the Code, be maintained except only where actual partition of the property itself can properly be made; and where it appears that such partition could not be made without great prejudice to the owners, the court has no jurisdiction except to give judgment dismissing the complaint.

Where A., by his will, gave his widow the income of his real and personal estate for life, provided she should remain his widow, with remainder, upon her death or remarriage, to his four children (one of whom is a minor), in equal shares, reserving to his widow, in case of her marriage, her dower in his estate; and in an action by one of the devisees of the estate in remainder for partition of the realty, a sale was directed as the only mode of division.

Held, that a purchaser at the sale should not be compelled to take title, the case being one where partition cannot properly be made — this notwithstanding the consent of the widow that the property be sold and the value of her particular estate be ascertained and paid to her, such value not being ascertainable under any rule or practice of the court.

The parties might, however, if the rights of an infant did not intervene, make such a mutual agreement for the disposition of the property and the division of the proceeds as should suit their interests.

First Department, General Term, December, 1883.

Before DAVIS, P.J., BRADY and DANIELS, JJ.

APPEAL from an order of the special term denying motion to compel purchaser to take title.

Henry Kropf and *G. H. Hoffman*, for appellants.

J. H. Van Vechten Olcott, for Lehning, respondent.

Wyatt & Trumble, for purchaser.

Scheu agt. Lehning *et al.*

DAVIS, *P. J.*—Peter J. Lehning died in 1867 seized of the premises sought to be partitioned by this action, leaving him surviving Frederica Lehning, his widow, the plaintiff; his daughter by a former wife, and Julia Van Cott, William George Lehning and Caroline Louisa Frederica Lehning, his children by the defendant, Frederica Lehning, all of whom are still surviving and of full age, excepting Caroline Louisa Frederica Lehning, who is an infant.

By his last will and testament he gave, devised and bequeathed to his widow the rents, issues and profits of his estate, as well real as personal, during her natural life, provided she should remain his widow. By the third clause of his will he gave, devised and bequeathed to his children, upon the death or remarriage of his widow, whichever should first occur, all the rest, residue and remainder of his estate, as well real as personal, to be divided among them equally, share and share alike; reserving, however, to his widow, in case of her marriage, her dower in his estate. By other provisions he appointed his widow guardian of the person and estate of his children during minority, and nominated her sole executrix of his will. This will was duly admitted to probate.

This action is brought by Charlotte L. Scheu, one of the devisees of the estate in the remainder for the purpose, amongst other things, of having a partition and division of the premises described in the complaint, according to the respective rights and interests of the parties, or, if such partition could not be made, that the same be sold under the direction of the court, and the proceeds divided among the parties according to their respective rights and interests. The defendants appear in the action, the infant defendant by her guardian, the other defendants by attorney. On a reference to ascertain whether actual partition could be made, the referee reported for good reasons that the property was not capable of equal partition, and that the only mode of division was by a sale. The widow filed in due form a consent that the property be sold, and an agreement to accept in lieu of

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her life or other interest in the premises and in satisfaction thereof a sum in gross out of the proceeds of the sale, according to her rights, to be ascertained by the report of the referee therein, "such sum to be computed according to the principles applicable to life annuities, pursuant to the Portsmouth or Northampton tables, and the seventy-first rule of this court."

Upon the coming in of the referee's report, the infant defendant by her guardian filed exceptions to the report, substantially insisting that upon the facts that no sale of the premises could lawfully be made. The court overruled the exceptions and gave judgment directing a sale and division of the proceeds. The premises were thereupon sold by the referee appointed for that purpose, and at the sale were struck off to the respondent, John Biehn, who paid ten per cent of the purchase money, and executed the ordinary memorandum of sale. At the time fixed for the delivery of the deed he appeared by his counsel, and refused to proceed, on the ground in substance that a good title could not be made under the judgment and sale. A motion was then made at special term to compel the purchaser to take title, which motion was denied, and the plaintiff and the widow appealed from the order of denial.

It is now well settled that a purchaser at a judicial sale will not be compelled by the court to take title unless the same be free from reasonable doubt (*Schreyer* agt. *Schreyer*, 86 *N. Y.*, 580; *Jordan* agt. *Poillon*, 77 *N. Y.*, 518).

This action, so far as relates to the partition of the property, is brought under section 1533 of the Code, which is in these words:

"Where two or more persons hold as joint tenants, or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for a partition of the real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein, but in such an action the property

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cannot be sold, and if it appears at any stage thereof that partition cannot be made without great prejudice to the owners, the complaint must be dismissed. Such a dismissal does not affect the right of any party to bring any action after the determination of the particular estate."

This section is distinctly applicable to and controlling the question before us. Under it the court had jurisdiction to entertain an action for the purpose, if that were practicable, of making an actual partition. But when it appeared, as it clearly does in this case, that such partition could not be made without great prejudice to the owners, it had no jurisdiction except to pronounce the judgment dismissing the complaint, so far as it related to that relief. Whatever may have been the law prior to the enactment of this provision, relative to the right to maintain actions of partition in such cases, the Code, by the section cited, has taken possession of the whole subject-matter and subjected it to the conditions prescribed by the section itself. So that we think an action of partition cannot be maintained, except only where actual partition of the property itself can properly be made.

It is supposed, however, that the consent of the widow that the property be sold and the value of her particular estate be ascertained and paid to her, enabled the court to proceed and pronounce the judgment of sale. In the first place, it may be suggested that that course of proceeding was not applicable to the case, because her estate was one the value of which could not with certainty be ascertained under any rule or practice of the court. The estate given to her was for her life, if she remained the widow of the testator. Upon remarriage the estate under the devise was wholly to terminate, and she be remanded to her dower interest alone. The value of such an estate cannot be determined by the tables mentioned in the stipulation. If it be treated as an absolute life estate, gross injustice may be done by paying over to her the value of such an estate divested of the condition which the testator imposed. The condition was a legal

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one, and the courts are bound to regard, however much they may disapprove it. Of course, if the rights of an infant did not intervene, and the parties were all of lawful age, they might make such a mutual agreement for the disposition of the property and the division of the proceeds as should suit their interests, but that would not require the intervention of an action of partition, nor the judgment of any court. When, however, a suit is brought for partition in a case of this character, especially where the rights of an infant can be affected, the court is bound to see to it that its judgment must not exceed the powers conferred by the statute.

In this case the purchaser could not under the circumstances receive a title by the referee's deed free from reasonable question or doubt. He was not bound, therefore, to proceed and complete the purchase.

The order of the court below must be affirmed, with ten dollars costs, besides disbursements.

BRADY and DANIELS, JJ., concurred.

CITY COURT OF NEW YORK.

J. WALTER THOMPSON agt. BRADHURST SCHIEFFELIN.

Appeal—An order overruling a demurrer to a complaint as frivolous, and granting judgment, with the privilege to defendant to plead anew, is not appealable—Code of Civil Procedure, section 1021.

Under the Code of Civil Procedure, as under the former Code, a decision of the court overruling or sustaining a demurrer, is an order and not an interlocutory judgment, from which no appeal lies.

General Term, December, 1883.

Before HYATT and HALL, JJ.

E. R. Meade, for appellant.

James M. Hunt, for respondent.

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HYATT, J.—This is an appeal from an order made at special term, overruling a demurrer to the complaint as frivolous, and granting judgment, with the privilege to the defendant to plead anew, which by this appeal he declines to accept. An appeal does not lie from this order. The decision was, as urged by the appellant, under section 1021, Code of Civil Procedure, under which the rule was settled by the court of appeals in the case of *The Cambridge Valley National Bank* agt. *Lynch* (76 N. Y., 514), wherein the court held that under this Code, as under the former Code, the decision of the court overruling or sustaining a demurrer was an order and not an interlocutory judgment, and that this Code did not provide for any appeal therefrom; the remedy is, therefore, by appeal from the judgment, final or interlocutory, entered upon the demurrer. The unsuccessful party may, if the successful party neglects to enter the proper judgment, enter it himself in order to appeal therefrom (*Wilson* agt. *Simpson*, 84 N. Y., 674). In this case the defendant not only declines to plead anew, but also either to enter the judgment as directed, or permit the plaintiff to do so, having stayed all action on his part in the premises. If the order is not appealable, it is unnecessary to consider whether or not the demurrer is frivolous.

The appeal must be dismissed, with costs.

HALL, J., concurs.

Bookman agt. Kurzman.

COURT OF APPEALS.

JACOB BOOKMAN and SIMON BING, Jr., appellants, agt.
FERDINAND KURZMAN.

Deed — Misdescription in — Duty of court as to interpretation of description — Purchaser compelled to fulfill his contract in accordance with corrected description.

Where, in the description in a deed, the place of beginning of the premises conveyed were stated to be at a point on the westerly side of an avenue, a certain distance from the "south-easterly corner" of the avenue and a street, and the description contains evidence that the word the draftsman intended to use was "south-westerly corner," the court should, in the interpretation of this description, read it so as to transform the word "south-easterly" into the word "south-westerly," and the defendant should be compelled to fulfill his contract to purchase the premises described in said contract, in accordance with the corrected description.

Decided December 14, 1883.

James M. Fisk, for plaintiff and appellants.

Ferdinand Kurzman, for defendant and respondent.

RUGER, *Ch. J.* — In March, 1871, Nicholas H. Moore and wife and Daniel Murray, conveyed to John Flannelly by warrantee deed certain premises situate in the city of New York, described in said deed as follows :

"All those lots, pieces or parcels of land, with the buildings thereon erected, situate, lying and being in the Twelfth ward of the city of New York, bounded and described as follows: Beginning at a point on the westerly side of Second avenue, distant fifty feet and ten inches from the south-easterly corner of Second avenue and One Hundred and Eleventh street; thence westerly and parallel with said One Hundred and Eleventh street and partly through a party wall, eighty feet; thence southerly and parallel with Second avenue, fifty feet; thence easterly and parallel with said One Hundred

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and Eleventh street, eighty feet to the westerly side of Second avenue ; thence northerly and along said Second avenue fifty feet, to the place of beginning."

The same deed also conveyed a lot of land on the southerly side of One Hundred and Eleventh street in the rear of the above described premises.

The question in this case is whether the court may and should, in the interpretation of this description, read it so as to transform the word "south-easterly" into the word "south-westerly." It appears that Flannelly's grantors had title to the premises on the west side of Second avenue, which would be included in such a reformed description. It also appeared that Flannelly conveyed the premises acquired by him under said deed by a description which gave as its starting place "a point on the westerly side of Second avenue, fifty feet and ten inches from the south-westerly corner of such avenue and One Hundred and Eleventh street." The word south-westerly was also used in the description contained in all of the deeds conveying said premises subsequent and previous to said deed of 1871.

In 1882, the plaintiffs contracted to sell and convey the same premises to defendant, describing them in accordance with the corrected description. Under said contract and in performance thereof the plaintiffs tendered to the defendant a deed of premises on the westerly side of Second avenue, which corresponded with the description in said Flannelly's deed, except in the use of the word "south-westerly," in place of the word "south-easterly." The defendant refused to receive said deed and fulfill his contract upon the ground that the title of said plaintiffs was defective on account of the use of the word "south-easterly" in the Flannelly deed, instead of the word "south-westerly."

Upon an agreed statement of facts the parties submitted the questions to the court whether the use of the word "south-easterly" in the Flannelly deed in contradistinction to the word "south-westerly" used in all other conveyances of this

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land, constituted such a defect in the plaintiffs' title as justified the defendant in refusing to accept the title offered to him. The court below held that it did, and ordered judgment for defendant.

In this we think they erred. We are of the opinion that by the intrinsic evidence of the deed the language of the description used, and the monuments, courses and distances therein referred to, it indisputably appears that the parties intended to use the word "south-westerly" therein, instead of the word actually written. The use of a rough diagram, showing the intersection of the two streets named therein, crossing each other at right angles, and running respectively north and south and east and west, demonstrates that the adoption of the term south-easterly as the one intended would create a starting point for the boundary line of the property intended to be conveyed in the center of Second avenue, and would locate the larger part of the granted premises in the traveled portion of such public highway. The same result would also follow if the description should be read as meaning the north-easterly corner of the said streets. The adoption of neither of the first two points stated would comply with the requirement of the deed, that the starting point should be on the westerly side of Second avenue, or that the first line should run parallel with One Hundred and Eleventh street. Neither of the lines run from these points would include the buildings described as being upon the premises, nor run upon a line partly through a party wall, or finally terminate upon the westerly side of Second avenue by a line which run along said Second avenue to the place of beginning.

The adoption of the term north-westerly as the corner intended, would require the survey to run over the first line twice to make out the description, and leave a space of ten inches, presumably running through the outer wall of the building, unconveyed on the line of One Hundred and Eleventh street, thus cutting off the property from the street,

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and would also directly conflict with that portion of the deed which locates the other land conveyed in rear of the described premises on the southerly side of One Hundred and Eleventh street.

The long established rules with reference to the construction of the descriptions of land contained in conveyances require courts to adopt such an interpretation thereof as shall give effect to the instrument according to the intention of the parties, if that is discoverable from legitimate sources of information (*Jackson agt. Clark*, 7 *Johns.*, 217; *Buffalo, N. Y. and Erie R. R. Co. agt. Stigeler*, 61 *N. Y.*, 384). In giving effect to such an intention, it is also their duty to reject false or mistaken particulars, provided there be enough of the description remaining to enable the land intended to be conveyed to be located (*Hathaway agt. Powers*, 6 *Hill*, 454; *Wendell agt. People*, 8 *Wend.*, 189; *Loomis agt. Jackson*, 19 *Johns.*, 452). It was said in *Robinson agt. Kane* (70 *N. Y.*, 154) that a conveyance is to be construed in reference to its visible locative calls, as marked or appearing upon the land, in preference to quantity, course or distance, and any particular may be rejected if inconsistent with other parts of the description and sufficient remains to locate the land intended to be conveyed. The rule that a monument controls other portions of the description in a deed is not inflexible, when the monument is repugnant to another of like character, or a map gives other results, the truth is to be ascertained from all of the facts of the case (*Townsend agt. Hayt*, 51 *N. Y.*, 656; *Higginbotham agt. Stoddard*, 72 *id.*, 94).

In the light of these rules it would have been the clear duty of any party who attempted to locate the land intended to be conveyed by this description upon starting a survey from the south-easterly corner of Second avenue, he would find, not only that he was not beginning upon the westerly side of Second avenue, but that he was locating the property conveyed in the public highway. Thus would be presented at the outset an insuperable obstacle to such a location, and this discovery

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would lead to the inevitable conclusion that the phrase used could not have been intended by the parties if there was any other meaning which could be extracted from the instrument. A further examination of the deed would disclose that the point of beginning was not only stated to be the westerly side of Second avenue, but also that the final line of such description was required to be entirely upon the westerly line of such highway and the southerly side of One Hundred and Eleventh street, and terminate at the point of beginning on the westerly side of Second avenue. It is impossible to mistake the location of the starting point of this description, which is thus not only twice correctly stated in the deed, but is also found to be in harmony with the location of all the monuments referred to therein, as well as the remainder of the description. That part of the description which causes the place of beginning to be reached by a line along the westerly side of Second avenue from the south, indicates unmistakably that the place of beginning was fifty feet and ten inches from the south-westerly corner of Second avenue and One Hundred and Eleventh street.

It is thus seen that the description contains abundant evidence as to the words which the draftsman intended to use.

The requirement that the land conveyed should be located on the westerly side of Second avenue and to the south of One Hundred and Eleventh street, that the first line should run parallel with One Hundred and Eleventh street and partly through a party wall, that the third line should run to the westerly line of Second avenue, and that the final line should run northerly, along said Second avenue to the place of beginning, furnishes irrefutable evidence of the place intended for a starting point, and also of the intention of the parties as to the location of the land supposed by them to be conveyed by the deed in question.

We are not unmindful of the rule which excuses the vendee of real estate under a contract of sale from accepting a title which is of doubtful validity or questionable legality, but we

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are clearly of the opinion that the circumstances of this case remove it from any such category.

The judgment of the general term (superior court) should be reversed, and judgment ordered for the plaintiff, with costs of both courts.

All concur.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of PHILIP HOFFMAN agt. GEORGE BUG, PETER L. OSTERHOUDT and JAMES G. TUBBY, assessors of the city of Kingston.

Taxes and assessments—How occupant of real and personal property owned by a non-resident should be assessed.

The relator P. H. was assessed upon the assessment-roll of the city of Kingston for the year 1883, for real estate valued thereon at \$40,000 and personal property to the amount of \$10,000. The owner of the property (which consisted of a brewery, and the real and personal property connected therewith) was J. H., who resided in the city of New York, and the relator P. H. was in the actual possession of the entire property, real and personal, and conducted and carried on the brewery under a power of attorney from the owner. Upon *certiorari* to review the assessment:

Held, that the assessment of the real estate to the relator was lawful and proper. It was not necessary that such real estate should be assessed to the relator "as lands of a non-resident."

Held, also, that the assessment of the personal property to the relator was valid. It could not be assessed to any other person, and it was not necessary to add to the relator's name the word "agent."

Ulster, Special Term, October, 1883.

CERTIORARI to review an assessment.

E. S. Wood, for relator.

John J. Linson, for assessors.

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WESTBROOK, J.—The relator, Philip Hoffman, is assessed upon the assessment-roll of the city of Kingston for the year 1883 for real estate valued thereon at \$40,000 and personal property to the amount of \$10,000.

The property for which the relator is so assessed consists of a brewery, and the real and personal property connected therewith, and of which he is in the actual possession. The owner of the property is Jacob Hoffman, who resides in the city of New York, and the relator is, as has just been stated, in the actual possession of the entire property, real and personal, and conducts and carries on the brewery under a power of attorney from the owner.

Upon these facts it is claimed in behalf of the relator, First. That chapter 152 of the Laws of 1878 requires the real estate to be assessed to him, if it is assessed to him “as lands of non-residents;” and second. That the personal estate should be taxed to him as agent. As both the real and personal property are assessed against him, without showing that the former is owned by a non-resident of the county, and the latter without a statement that he is the agent of the owner, it is urged that the whole assessment is void. The points will be examined separately.

First. Is the assessment upon the real estate in the proper form? The act of 1878, by its second section, which is declared to be amendatory of “section two of title two of chapter thirteen of part one of the Revised Statutes,” provides that “lands occupied by a person other than the owner, may be assessed to the occupant, as lands of non-residents, or, if the owner resides in the county in which such lands are located, to such owner.” The claim of the relator is, that the statute, as it now reads, provides for only two modes of assessing land occupied by a person other than the owner, and these are, either “to the occupant as lands of non-residents,” or to the owner, if he resides in the county. To maintain this proposition he reads the statute as if no comma followed the word “occupant,” thus making a single mode of assessment,

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besides the one to the owner, which is to "the occupant as lands of non-residents."

The statute, prior to its amendment, read thus: "Land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident lands" (1 *Edm.*, 361, *sec.* 2). It will be seen that provision was thereby made for an assessment in either one of three ways, to wit, to the occupant, to the owner, or as non-resident land. The change made by the act of 1878 is, that to justify the assessment to the owner he must reside in the county. This is evident from the punctuation. The statute does not read, "to the occupant as lands of non-residents," but a comma occurs after the word "occupant," and it should be read according to its punctuation, with a pause after that word, thus, "to the occupant, as lands of non-residents, or, if the owner resides in the county in which such lands are located, to the owner." This view is made more clear by recalling the fact that the statutes of this state provide two ways for taxing real estate, to wit, either as resident or non-resident lands. If as the former, then the name of its owner or occupant to whom it is assessed must appear in the first column of the assessment-roll (1 *Edm.*, 363, *sec.* 9; 2 *R. S.* [7th *ed.*], 990, 991, *sec.* 9): and if as the latter, then the assessment is upon the property itself, and not upon any individual, and it must appear on the roll "in a part thereof separate from the other assessments" (1 *Edm.*, 364; *secs.* 11, 12; 2 *R. S.* [7th *ed.*], *secs.* 11, 12). As the assessment of land as that of non-residents is distinct and different from the other, and must be placed on the assessment-roll "in a part thereof separate from the other assessments," it would seem to be impossible to tax it both as resident and non-resident upon the same roll, and therefore the construction of the act of 1880 claimed by the relator cannot be adopted, because he insists that the two should be combined to make a valid assessment. It must therefore be held that the assessment of the real estate to the relator is lawful and proper.

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Second. Was the assessment of the personal property to the relator valid? The statute provides: "Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, *including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator*; and in no case shall property so held under either of those trusts be assessed against any other person" (1 *Edm.*, 362, *sec.* 5; 2 *R. S.* [7th ed.], 989, *sec.* 5).

It would seem clear from this provision that not only was the assessment upon the relator for the personal property in his possession as agent lawful, but also that it could not be assessed to any other person. The counsel for the relator insists, however, that while the assessment to him may be legal, it should have been "with the addition to his name of his representative character." If the section of the statute upon which this claim is based (1 *Edm.*, 363, *sec.* 10; 2 *R. S.* [7th ed.], 991, *sec.* 10) be referred to, his error will appear. The section does provide: "When a person is assessed as *trustee, guardian, executor or administrator*, he shall be assessed as such, with the addition to his name of his representative character," but such section does not cover the case of an *agent*, and such the relator is, and he is neither a "trustee, guardian, executor or administrator."

The objection to the assessment upon the personal property in the possession of the relator must also be overruled, and as no questions, other than those already examined, have been made upon this proceeding, the respondents are entitled to an order confirming the assessment and dismissing the writ.

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SUPREME COURT.

JOHN H. RIKER, as executor, &c., agt. THE SOCIETY OF THE
NEW YORK HOSPITAL and others.

Will — Construction of — When not void under the statute against perpetuities.

In 1862, three sisters, Margaret, Mary and Sarah, were the owners in equal proportions of a large amount of real and personal property called the joint Burr estate. Margaret died in September, 1862, leaving a will by which she devised, on the death of her surviving sister, all her lands to executors until the sale thereof in trust at such times as they might deem for the benefit of the estate. She gave to them the proceeds of her lands and personal estate, not otherwise specifically given, to pay legacies to various charities. Mary, who died in 1865, gave her real and personal estate to her executors after the death of her sister, and the rents, issues and profits of the estate to be sold by them were to be applied to the payment of residuary legacies to charities. The legacies referred to in Margaret's will are made payable within four years from the death of the survivor of the sisters. By a codicil to Mary's will the legacies to charities are directed to be paid within two years from the death of her sister:

Held, that these wills are not void under the statute against perpetuities, there being not in either of them any suspension of the absolute power of alienation of the real estate for more than two lives in being at the creation of the estate.

Special Term, December, 1883.

E. Ritzema De Grove and John E. Parsons, for plaintiff.

Franklin & Clifford A. H. Bartlett, for next of kin.

Miller, Peckham & Dixon, for St. Luke's Hospital.

Varnum & Harrison, for Corporation for the Relief of Widows and Children of the Clergymen of the Protestant Episcopal Church in the state of New York.

Tracy, Olmstead & Tracy, for American Bible Society.

T. C. Cronin, for Burr & Burton Seminary.

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C. D. Adams, for New York Juvenile Asylum.

William Venville, for Association for the Relief of Respectable Aged Indigent Females in the city of New York.

Gray & Davenport, for Association for the Benefit of Colored Orphans.

Platt & Bowers, for New York Institution for the Blind.

Lord, Day & Lord, for Eye and Ear Infirmary.

De Forest & Weeks, for Orphan Asylum Society in the city of New York.

Charles E. Whitehead, for Children's Aid Society.

Eugene Smith, for Prison Association.

Frederick Wm. Joeckel, for American Tract Society.

Frederick de P. Foster, for Society for Relief of Destitute Children of Seamen.

De Witt, Lockman & De Witt, for defendant Samuel Riker, executor, &c., and others.

Cyrus Lawton, for defendants Hewlett, Treadwell and Townsend, as executors, &c.

J. Herrick Henry, for Protestant Episcopal Society for the Promotion of Evangelical Knowledge.

Sullivan & Cromwell, for Nursery and Child's Hospital.

Wilson M. Powell, for Society of the New York Hospital.

John Sherwood, for New York Dispensary.

Edmund T. Huerstel, for defendant Daniel T. Kissam.

Julian T. Davies and *James McNamee*, for Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America.

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Hoppin & Talcot, for Women's Hospital.

Stanley, Clarke & Smith, for defendant Sidney Burr, administrator.

MACOMBER, *J.*—This is an action for the construction of the last wills of Margaret Burr and Mary Burr, and for the distribution of the estate under these wills respectively.

The controversy arises mainly between the defendants, who claim to be next of kin of the testatrices and of their sister, Sarah Burr, and the representative of such next of kin on the one hand, and the defendants the several charitable, religious and missionary corporations on the other hand. The individual defendants, bearing the same degree of kinship to Margaret Burr and Mary Burr as they do to Sarah Burr, are not, nevertheless, in any legal sense the next of kin of either Margaret or Mary, for, at the death of Margaret, her only next of kin were the surviving sisters Mary and Sarah, and at the death of Mary, her only surviving next of kin was Sarah. The individual defendants are, however, the next of kin of Sarah Burr, and consequently are interested in having her estate realize as much as may be from the estates of her deceased sisters, and for that reason ought to be heard in the case as though they were in fact the next of kin of the persons whose wills are under consideration.

In the year 1862, these three sisters were the owners in equal proportions of considerable real and personal property, which is commonly referred to as the joint Burr estate. Margaret Burr died on the 24th day of September, 1862, leaving a last will and testament which bears date August 11, 1862. Mary Burr died on July 8, 1865, and Sarah Burr died March 1, 1882.

It is claimed by the next of kin of Sarah Burr that the wills of Margaret and Mary Burr are void under the statute against perpetuities, in that they suspend the power of alienation for more than two lives in being. The material portions of the wills which provoke this opposition to their validity

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are in substance these: After giving to her two sisters, or the survivor of them, full power of sale of all real estate, to be exercised at any time, Margaret Burr devised, in the second clause of her will, on the death of the surviving sister, all her lands to her executors. "I give to such executors, after the death of my said sisters, the rents, issues and profits of said lands, until the sale thereof, in trust as aforesaid, which sale may be at public auction or at private sale, in the discretion of the executors, at such times, on such terms and such manner as they shall deem to be for the best benefit of my estate; and I give to them the proceeds of my lands and all my personal estate, not otherwise specifically given, in order to the payment of the legacies hereinafter expressed."

Mary Burr, by the third article of her will, devised unto her executors "all the residue and remainder of such real and personal estate, after the death of my said sister, and the rents, issues and profits of said real estate, which is to be sold by them as is hereinafter expressed, and the proceeds of which, with the income after her decease, are to be applied in payment of the particular residuary legacies hereinafter given. * * * I direct the sale of the real estate to be made at such times and in such manner as my executors who may act shall deem expedient for the purposes of payment to the legatees as hereinafter expressed."

The legacies referred to giving to charities by the fifth clause of the will are made payable within four years from the death of the survivor of the sisters. By the codicil to Mary Burr's will the legacies to charities were directed to be paid within two years from the death of her sister Sarah.

I do not find in either of these wills any suspension of the absolute power of alienation of the real estate for more than two lives in being at the creation of the estate. Without specially adverting to the numerous cases upon the general subject, I deem it necessary to refer only to the case of *Robert agt. Corning* (89 *N. Y.*, 225). At page 235 the court says: "The rule declared in this section (1 *R. S.*, 723, *sec.* 14) con-

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stitutes under our statutes the sole basis of an unlawful perpetuity. * * * But the mere creation of a trust does not, *ipso facto*, suspend the power of alienation. It is only suspended by such a trust, where the trust term is created either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land without restriction as to time the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee or in consequence of a discretion reposed in him by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the power of alienation and not at all to the time of its actual exercise; and when a trust for sale and distribution is made without restriction as to time, and the trustees are empowered to receive the rents and profits pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is alienable by statute during the existence of the trust does not suspend the power of alienation, for the reason that the trustees are persons in being who can at any time convey an absolute fee in possession." The discretion vested in the executors to delay the sale of the real estate, not exceeding three years, was there held not to create a trust term for any period of time, and involved no suspension of the power of alienation.

Under this decision there was not in the case of either of these wills a moment of time when the executors did not have it in their power, acting in accordance with the provisions of the will, to sell and dispose of the real estate and convey a perfect title thereto. The mere fact that they did not sell is of no significance in my judgment. Furthermore, there was an equitable conversion of the real estate into personalty immediately upon the death of the survivor of Margaret's sisters, and in their hands the profits of the real estate received by the executors would go with and be deemed a part of the converted fund. As is held in *Lent agt. Howard* (89 N. Y.,

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169): "If, however, the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, then, in equity, the intermediate rents and profits go with and are deemed to be a part of the converted fund, and the heir may be compelled to account therefor to the executor and the latter to the beneficiary for so much thereof as is received by him as well as for the proceeds of the sale."

In my judgment the legacies to charities in these wills are not invalid by reason of the directions there given that they should be paid within four years in one will, or within two years in the other, from the death of the survivor of the sisters respectively. As was held in *Gilman agt. Reddington* (24 N. Y., 18) a vested legacy payable in three years, or at other periods depending on a life or two lives in being, is legal. The words prescribing the time within which the legacies should be paid are not, in their nature, in the way of any enlargement of the time, but are used by way of restriction. The title of the legatee to the legacy immediately attached upon the death of the testatrix (*Manice agt. Manice*, 43 N. Y., 382).

I come now to the question of the validity of the several bequests to the charitable and religious corporations, arising upon the special provisions of their charters. Among all of the defendant corporations I do not find but two which fall within the restrictions made by chapter 319 of the Laws of 1848, by which a bequest to a benevolent, charitable, scientific or missionary society, shall not be valid in any will which shall not have been made at least two months before the death of the testator. Margaret Burr died within the two months after the execution of her will, and it follows, therefore, that any bequest to any religious or charitable societies, which come within the inhibition of this statute are invalid and fall into the residuum of the estate. These are the Children's Aid Society and St. Luke's Hospital, which were organized under that act. The bequests to them, how-

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ever, in Mary Burr's will, are not open to this objection. None of the charitable and religious corporations are prohibited from taking any portion of the legacies given to them, by reason of any other part of said act, or under chapter 360 of the Laws of 1860, which prevents the testator, leaving parents, husband, wife or child, from giving beyond a certain amount of his or her property to such institutions; for neither of the testatrices left her surviving a father, or mother, a husband, or child.

No question arises in regard to the existence of the corporation known as the Episcopal Society for the Promotion of Evangelical Knowledge, except the proof as to its organization, which was disposed of at the trial. But it is claimed that the legacies to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America are void because of misnomer. It is shown by the evidence that the Missionary Society of the Protestant Episcopal Church for Foreign Missions, The Board of Missions of Protestant Episcopal Church for Foreign Missions, The Board of the same church for Domestic Missions, The Foreign Missionary Society of the Protestant Episcopal Church of the United States, mentioned in these wills, were all intended to be for the defendant The Domestic Foreign Missionary Society of the Protestant Episcopal Church in the United States of America.

I need not refer to the proof in detail. The object of the testatrices' bounty is here clearly ascertained. The corporation may be designated by its corporate name in the will by which it is usually or popularly called or known, or by the name or description by which it can be distinguished from every other corporation (*Lefevre agt. Lefevre*, 59 N. Y., 434; *St. Luke's Hospital agt. American Association*, 52 N. Y., 191). And, without going over the same ground as to each of the different corporations mentioned in these wills, where the precise and technical name was not actually used, I refer

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to the foregoing decisions to sustain their claims to their legacies respectively.

It is further objected against the validity of the legacies to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States, that in the years 1862 and 1865, it held, and now holds, personal property beyond the limit placed by law. This is not tenable. By its original charter the net income of said society arising from its real estate could not exceed \$2,000 annually. By the fourth section the corporation possessed the general powers and were subject to the provisions contained in title 3 of chapter 18 of the first part of the Revised Statutes, so far as the same were applicable. It appears that in 1862, and up to 1865, this society held no real estate. The amount of its personal property is not shown, but I do not understand that there is any limit by statute on the amount of personal property which the society can take, provided its purposes require it.

It is further claimed by the next of kin of Sarah Burr that the legacies to the Society of the New York Hospital are invalid, because, by its charter, it is permitted to take and hold personal estate only when the clear yearly value of its real estate does not exceed five thousand pounds sterling. This charter was granted in the year 1871 by the name of the New York Hospital. In the year 1810 its name was changed to the Society of the New York Hospital. The yearly value of its real estate was originally limited to \$25,000. Its charter had been amended from time to time — in the years 1810, 1816, 1828, 1850, 1875 and 1879. By the Laws of 1879, chapter 244, it was permitted to receive, by devise or grant or gift, and to hold and enjoy real and personal estate for the uses and purposes of the corporation, the net yearly income of which should not at any time exceed \$500,000.

It also appears in evidence that in the year 1881, its receipts from real estate were upwards of \$150,000. It does

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not appear, however, that in 1862 or 1865, or prior thereto, or for several years subsequent thereto, the society received any revenue or income from its real estate, and that, consequently, I do not see that any serious question can be made against the validity of these bequests; because, manifestly, their validity depends upon the condition of things at the time that the legacies vested. Against the validity of the legacy to the New York Dispensary, it is claimed by the individual defendants that at the time of the death of Margaret and Mary Burr, respectively, there was no such corporation in existence. It is shown, however, that many years previous to, and at the time of their deaths, there was a corporation known as the Trustees of the New York Dispensary, and that it was a charitable corporation, performing its functions in the city of New York, and was organized in the year 1795. Its charter was amended by the act of May 5, 1869, by which its name was changed to the New York Dispensary. Furthermore, it does not appear that at the time these legacies were given its income was above the sum limited in its original charter.

It is also urged that the defendant the New York Institution for the Blind did not exist at the time these wills went into effect, but that its charter had expired. I find, however, among the papers submitted in the case, and to which I presume the attention of the opposing counsel was called, is an act of the legislature, passed April 15, 1852, containing its charter.

Objection is also made to the bequest to the Society for the Relief of Widows and Small Children, because, first, its charter expired May 1, 1865; and second, that its charter, even though existing, limits the real and personal estate which it may hold to the value of \$100,000, and that it appears in evidence that its personal estate amounted to \$132,000. By the last clause of its original charter it was enacted that the society should be in full force until the 1st day of March, 1824, and no longer. By chapter 278 of the

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Laws of 1825, its charter was revived, and all forfeitures, by reason of the expiration of its original charter, were remitted. By chapter 226 of the Laws of 1845, the society was again revived, and continued in force until the 1st day of May, 1865. By chapter 440 of the Laws of 1862, its real estate was restricted to the value of \$100,000. By chapter 66 of the Laws of 1869, it was authorized to take by bequest or otherwise, and to hold real and personal estate to an amount not exceeding \$250,000. It did not become subject to the provision of the act of 1848 until after the act of 1869 was passed. The legacies vested immediately upon the death of the testatrices. There is no evidence of the value of the property held by the society at the date of Margaret and Mary Burr's death. It is quite clear to me that if the present value of the property of this society is to be taken into account, the limitation of \$250,000 by the act of 1869 should be taken into the account also.

It is also contended that the New York Eye and Ear Dispensary cannot take the bequest given in Margaret Burr's will, because it did not come into existence until 1864, two years after her death. This society was incorporated by special act of the legislature in 1822, under the name of the New York Eye Infirmary, and, in 1864, the name was changed to the New York Eye and Ear Infirmary. It was manifestly the society intended by the will of Margaret Burr.

What has already been said may be applied to the Nursery and Children's Hospital and the Association for the Benefit of Colored Orphans of the City of New York, and to the Corporation for the Relief of Widows and Children of Clergymen, and to St. Luke's Home for Indigent Christian Females, and to the Society for the Relief of Destitute Children of Seamen.

The American Bible Society was organized by special charter by chapter 68 of the Laws of 1841. By the second section of that act the net income of said society arising from its real and personal estate was limited to the sum of \$5,000

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annually. By chapter 247 of the Laws of 1852, authority was given it to purchase, take and hold and convey real estate even though the net annual income of the society should exceed the amount limited in its charter.

The American Church Missionary Society was chartered by chapter 189 of the Laws of 1861. Its annual income from real estate at one time held, could not by that act exceed the sum of \$30,000. As to its personalty, its power to take is not limited.

The Protestant Episcopal Church Missionary Society for the seamen in the city and port of New York was chartered by chapter 147 of the Laws of 1844. By its charter it was lawful for such society to build, purchase, hire, take and hold one or more houses and lots, and the requisite furniture thereof, for the boarding, lodging and entertainment of seamen and boatmen of the city of New York, to an amount not exceeding \$100,000, and demise the same. There is no valid claim that this society has exceeded the amount of property which it is capable of holding.

This completes, I believe, the examination of the charters of the several different corporations in respect to their ability to take and hold property by gift, grant, devise or bequest.

The legacies to individual defendants are not disputed, and require no special examination. It follows, therefore, that the legacies to the several charitable, religious and missionary societies mentioned in the wills of Margaret and Mary Burr (excepting those to the Children's Aid Society, St. Luke's Hospital, in Mary Burr's will) are valid, and should be paid by the executors in accordance with the intention of the testatrices, and as particularly directed to be done in my findings of fact and of law.

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SUPREME COURT.

HARRIET L. BULKLEY agt. PETER STAATS, executor, &c.

Action — Distinction between legal and equitable remedies are abolished — Code of Civil Procedure, section 3339 — Trust — When and how created by will — Parties.

Where C. died leaving an only daughter named Ella about eight years of age, leaving a last will and testament by which he gave all his property to this daughter, with the income and profits thereof; and by it he also desired his executor, the defendant S., to take charge of his property, rent out the real estate, take care of his household furniture and other property until his daughter attained the age of twenty-one years, and requested his executor should provide his child with a suitable home and see to her education and pay for the same out of his said property, and to sell and convey his real estate at any time during the minority of his said daughter, and also sell his furniture at any time in his judgment it will be for the interest of his said child. The defendant G. was appointed the general guardian of the child Ella and placed her at school with the plaintiff, and there is due to the plaintiff for board and tuition and supplies furnished to the child \$434 68. In an action brought to procure the application of the money of the child to the payment of the plaintiff's claim:

Held, that the fund in the hands of the executor is held in trust for that purpose and its application can be enforced by the courts.

Held, also, that it is immaterial what the action is called which is instituted to enforce this duty resting on the executor. There is now but one form of civil actions, the distinction between legal and equitable remedies being abolished, and if the case made by a party entitles him to any remedy it must be granted where an answer has been interposed even in disregard of the prayer for relief.

Held, further, that it was proper to make the infant child and her general guardian as well as the executor parties to the action.

Second Department, General Term, December, 1883.

E. C. Delevan, for plaintiff. The will charges the executor with the duty of selling real and personal property to provide means for the maintenance and education of the infant. A court of equity has control over trustees to compel the execution of the trust (*Matter of Burke*, 4 Sandf. Ch., 617; *Wood*

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agt. *Wood*, 5 *Paige*, 596). First. A fund was placed in the hands of the defendant Staats, as executor, a sufficient amount of which was appropriated, by the terms of the will, to the payment of the claim in question. As the executor refuses to make such appropriation the plaintiff seeks to have it made by a decree of this court. 1. It is clear that here was a fund expressly appropriated, by the terms of the will, to the payment of claims of the character in question. The language is. "And I do hereby request that my said executor shall provide my said child (the defendant Ella) with a suitable home, and see to her education, and pay for the same out of my said property." The will goes on to empower the executor to sell and convey the real and personal estate of the testator at any time during the minority of his daughter. This power to sell, as may be clearly seen by the remainder of the clause, points directly to the payment of such claims as might thereafter be incurred for the maintenance and education of the said Ella, thus clearly appropriating the fund (or so much thereof as should be necessary) to the payment of claims of this character. 2. It was thought proper to make Griffin, the guardian, a party, as the other defendants might show that he had money in his hands applicable to the payment of the claim in question, derived from the fund which the testator had provided for the payment of claims of this character whenever they should arise, which equity might require to be first appropriated to the payment of the claim in question before the remainder of the fund would become liable for its payment. It is perfectly clear that both the guardian and legatee might have, or claim to have, defenses to the action, and it was most proper to invite them, respectively, to make any defense they, or either of them, might have or claim to have. No personal judgment is asked against either of them, and no harm could ensue if neither appeared or answered (*See Code, secs. 446, 447, and cases cited under these sections in Bliss' Code*). 3. That this court has power in this manner to compel the execution of this trust is too obvious to require

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argument or citation (*See 6 Wait's A. and D.*, 390, and cases there cited; 3 *id.*, 139, 140, 141; *Benson agt. Leroy*, 4 *Johns. Ch.*, 651; *Wood agt. Wood*, 5 *Paige*, 596). The child must have support, and a trust arises in favor of anyone who furnishes it as soon as it is so furnished (*Wood agt. Robinson*, 22 *N. Y.*, 564). This is not the case of a mere power or authority to exercise, or omit to exercise, a discretion in the support and education of this child; if it were it is enough that it has been executed. The rule is that where a power partakes of the nature of or is coupled with a trust a court of equity will enforce it, even though the power be extinguished at law by the death of the donee of it or otherwise (3 *Wait's A. and D.*, 140, citing 3 *Ves.*, 370; 1 *Rich. Eq.*, 324; 2 *Allen*, 101; 4 *Gray*, 240; 35 *N. Y.*, 83). The pretense that no privity of contract or otherwise is shown connecting the executor Staats with the transaction is not even specious. No privity was necessary. What if Staats had been dead the court would execute the trust or appoint some one to do it. But here a surrogate's court has placed Griffin in charge of the person of the infant, and he, in compliance with his obvious duty, places his ward at a "suitable home," thus "seeing to her education," in fulfillment of the trust created by the will. Could more emphatic "privity" be imagined? Toward the payment of the expenses so incurred by the guardian the executor furnished him (the guardian) \$550 to be used, and which was used, in part payment of the obligation so incurred. Is not this sufficient privity, even if privity were necessary? Second. It is submitted that the court has before it sufficient and undisputed proof of a valid claim. It has also before it all the parties who could have been heard in opposition to the claim. It has also undisputed jurisdiction over the fund from which the claim must be eventually paid. A thousand suits with a thousand parties could not more fully possess the court of every fact that can be made to bear upon the question of the payment of this claim. On what principle of law is it, then, that we are sent out of court? Are the pleadings

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insufficient or inadequate? They are not. But if they were, let this court now and here conform them to the facts as proved, in accordance with the settled practice which has long prevailed in this court (*Coleman agt. Playsted*, 36 *Barb.*, 27; *Lounsbury agt. Purdy*, 18 *N. Y.*, 515; *Pratt agt. H. R. R.*, 21 *N. Y.*, 305; 6 *N. Y.*, 97; 21 *N. Y.*, 531; 20 *N. Y.*, 360; 13 *N. Y.*, 127). Has the plaintiff failed to make a case against all the defendants? Let the court give judgment against such of them as the plaintiff has not failed to make a case against, in accordance with the law and practice that has long prevailed (*Code*, sec. 456, 1204–1205; *Armitage agt. Pulver*, 37 *N. Y.*, 491), where the court says: “The referee is bound to grant the plaintiff any relief legal or equitable to which his allegations and proof entitle him.” It is not denied by the defendants, or doubted by the referee, that upon these same allegations and proofs a judgment must pass against the defendant Griffin, had he been sued alone, and had the prayer of the complaint demanded such judgment against him. In *Goulet agt. Asseler* (22 *N. Y.*, 225), the court says: “The form of the complaint in this respect (whether in law or equity) would be of no importance provided the proof had been such as to entitle the plaintiff to the judgment rendered.” In the *New York Ice Company agt. New York Insurance Company* (23 *N. Y.*, 359), the court of appeals, Comstock, J., says: “I am of opinion that it was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief demanded if there was enough left of his case to entitle him to recover the sum in which he was insured,” *i. e.*, a judgment as at law for the amount of his claim. In *Emery agt. Pease* (20 *N. Y.*, 64), the court says: “In determining whether an action will lie, the courts are to have no regard to the distinctions between legal and equitable remedies.” It is well settled that the court will not regard the prayer of a complaint when there is an appearance on the part of the defendant (*old Code*, sec. 275, *new*, sec. 3339), but will, if necessary, in the teeth of such prayer, give such judg-

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ment as the facts, legally proven, entitle the party to (*Marquot* agt. *Marquot*, 12 *N. Y.*, 341; *Emery* agt. *Pease*, 20 *N. Y.*, 62; *Jones* agt. *Butler*, 20 *How.*, 189; *Armitage* agt. *Pulver*, 5 *Trans. App.*, 188). It is not denied that the facts proven before the referee were fully alleged in the complaint, and legally proven upon the hearing. The fact that Griffin was sued with others, furnishes no reason why judgment should not have gone against him alone (*Code*, *secs.* 456, 1204, 1205). Nor yet does the fact that he was sued in an equity action, when, indeed, he would have been liable in a legal action, without the intervention of the equitable powers of the court, furnish any reason why judgment, as in an action at law, should not have been given against him (*N. Y. Ice Co.* agt. *N. W. Ins. Co.*, 23 *N. Y.*, 357; *Bidwell* agt. *Astor*, 16 *N. Y.*, 263; *Greasen* agt. *Keteltas*, 17 *N. Y.*, 491; *Scott* agt. *Barton*, 24 *N. Y.*, 40; *Bradley* agt. *Aldrich*, 40 *N. Y.*, 504; *Durand* agt. *Hankerson*, 39 *N. Y.*, 287; *Rome, &c.*, *Bank* agt. *Eames*, 1 *Keyes*, 588). Third. The referee has distinctly found that the defendant Griffin is liable to pay the claim in question upon a distinct promise, the validity of which is not questioned, to pay the same, and that he has "neglected to do so." Why then did he not direct judgment to be entered against him as he was bound to do (*Armitage* agt. *Pulver*, 37 *N. Y.*, 494)? The referee seems to have assumed that this court has no jurisdiction in an equity action to give legal relief; that if a party enter the equity door of the court with a legal action he must, whatever may be his legal rights, go out of court in that action and re-enter the court again by its legal door if he would secure his right of action. This is a mistake. There is no distinction in this court, so far as the question of jurisdiction is concerned, between actions at law and actions in equity (*Code*, *sec.* 3339; *old Code*, *sec.* 69). The case of *Adee* agt. *Bigler* (81 *N. Y.*, 349) seems to be relied upon to sustain this position, but it is not an authority for such a doctrine. That case presented a mere question of convenient practice. The court says:

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“The provision of the Code of Civil Procedure has not changed the practice” which prevailed under the old system, and which required a judgment to be obtained before a court of equity could be invoked, to “reach assets and apply them to the payment of a money demand.” This practice did not rest upon the distinction between law and equity jurisdiction, but solely upon the provisions of the statute (*see 2 R. S., part 3, chap. 1, title 2, art. 2, sec. 38*), as is clear from the case of *Donovan agt. Finn (Hopk. Ch., 59)*, which distinctly held that an action to discover property and compel the application of it to the payment of a judgment, after the return of an execution, was not an equity action, but an action at law over which the court of chancery had no jurisdiction. The statute simply provided that after judgment and the return of an execution the court of chancery should take jurisdiction of an action to compel a discovery of property, and apply such property to the payment of the judgment. But it is idle to talk about jurisdiction in law as distinct from jurisdiction in equity since the Code provides (*old Code, sec. 69*) that “the distinction between actions at law and suits in equity, and the forms of all such actions and suits hereafter existing are abolished, and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action ;” and (*new Code, sec. 3339*) “there is but one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.” In *Cole agt. Reynolds* (18 N. Y., 74) the court of appeals says: “Whether the action depend upon legal principles or equitable, it is still a civil action to be commenced and prosecuted without reference to this distinction. * * * If under the former system a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the Code, will entitle him to a judgment to the same effect. If the facts

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are such as that at common law the party would have been entitled to judgment, he will" (by proceeding as in equity) "obtain the same judgment." The entire effect of the case of *Adee* agt. *Bigler* is to establish as a matter of convenience, and in compliance with the provision of the Revised Statutes above cited, that in case a party desires to obtain a discovery of property and have it applied to the payment of his claim that he must first put the claim into judgment so as to avoid the inconvenience of trying one part of the same case by a jury (when that should be necessary) and the other by the court. But there is not the slightest analogy between such a case and the case at bar. But if there were more or less analogy the provision of the Revised Statutes applies to one case and does not apply to the other. This practice never obtained outside of that class of actions known as creditors' bills. When a party asserts an equitable lien upon a fund he means that he has a claim which a court of equity will enforce against such fund or property. Was a court of equity ever known to say "you must first put your claim into judgment before we can consider whether it is an equitable lien upon the fund in question" (*See Williams et al.* agt. *Ingersoll et al.*, 89 *N. Y.*, 508). Fourth. The plaintiff, upon the allegations and proofs, was entitled to a judgment against the defendant Ella on the ground that the claim in question was for necessities (*Randall* agt. *Sweet*, 1 *Denio*, 460; *Smith* agt. *Oliphant*, 2 *Sandf.*, 306; 2 *Paige*, 419; 9 *Cow.*, 626; 17 *Barb.*, 428). Fifth. All the facts being before the court, this court will render such judgment as the referee should have directed to be entered.

E. P. James, for defendant Staats.

Franklin Staats, for defendant Griffin.

DYKMAN, *J.* — Charles Curry died leaving an only daughter name Ella Curry, about eight years of age. He also left a last will and testament by which he gave all his property to

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this daughter, with the income and profits thereof. By it he also desired his executor, the defendant Peter Staats, to take charge of his property, rent out the real estate, take care of his household furniture and other property until his daughter attained the age of twenty-one years. Then follows these words:

“And I do request that my said executor shall provide my said child with a suitable home and see to her education and pay for the same out of my said property and to sell and convey my real estate at any time during the minority of my said daughter, and also sell my furniture at any time in his judgment it will be for the interest of my said child.”

The will was proved and Staats became the executor and the defendant, Hobart Griffin, was appointed the general guardian of the child Ella. He placed her at school with the plaintiff, who is the proprietor of a boarding school, and there is due to her for board, tuition and supplies furnished to the child, \$434.68.

This action is brought to procure the application of the money of the child to the payment of the plaintiff's claim, and there is sufficient for that purpose now in his hands.

It is to be noticed that by this will the property is all given to the child absolutely, and then the executor is clothed with a power of sale. Then the executor is requested to take charge of the property, rent the real estate, provide the child with a suitable home, see to her education “and pay for the same out of my said property” so it comes to this: the executor holds property belonging to this child, out of which he is to pay sufficient to provide her with a suitable home and her education. The fund is held in trust for that purpose, and its application can be enforced by the courts.

It is quite immaterial what the action is called which is instituted to enforce this duty resting on the executor. There is but one form of civil actions in this state (*Code Civil Pro.*, sec. 3339). In the administration of justice, our courts are untrammelled by distinction between legal and equitable

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remedies. They are all abolished and parties are no longer turned out of court because they make mistakes in the remedy they pursue.

On the contrary, if the case they make entitles them to any remedy, it must be granted where an answer has been interposed even in disregard of the prayer for relief (*Emery* agt. *Pease*, 20 *N. Y.*, 62).

In view of these principles there has been an evident miscarriage of justice in this case. This is not an action to reach assets and apply them to the payment of a claim. It is an action to compel the performance of a duty or if you please to call it so, an action to enforce and compel the execution of a trust. The contract for the maintenance and education of this child was made by her guardian with the plaintiff, with the knowledge of the executor, and the justice of the claim is manifest and undisputed.

The executor has in his hands a fund expressly appropriated by the will to the payment of claims like that of the plaintiff and the court will compel its application. In this case a trust has been created by the will for the payment of this and other similar debts, and the courts are bound to take care that the trust is executed. The assets and property of this estate were placed under the jurisdiction of the court by the creation of the trust (*Benson* agt. *Leroy*, 4 *John Ch.*, 650).

No difficulty will be experienced in entering the proper judgment. It was proper to make the infant child and her general guardian parties to the action to the end that they might be afforded an opportunity to dispute and litigate the plaintiff's claim.

Besides, it is the property of the child in the hands of the executor which is sought to be applied to payment of the claim. The executor is a proper party too, because he is to be forced to the performance of his duty. The judgment will be in form against all the defendants for the amount of

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the plaintiff's claim to be paid by the executor out of the funds in his hands appropriated by the will.

The judgment should be reversed, the order of reference vacated and a new trial granted, costs to abide the event.

SUPREME COURT.

SOLOMON H. GREENBAUM and WILLIAM JOSEPHY agt. TOMAS DWYER and JOSEPH W. BELL.

Summons—Service of, by publication—What proof of inability to serve the defendant in this state insufficient—Code of Civil Procedure, section 439.

When the allegations in the papers on which an order for the service of a summons by publication was issued was as follows: The affidavit alleged "that as deponent is informed and believed that the defendants are not residents of this state, but reside in the city of Laredo, state of Texas, as deponent is informrd by defendants themselves in letters received from them at said place." Also, "that deponent has caused a summons and complaint to be issued in this action against the said defendants to the sheriff of the city and county of New York, but that said defendants cannot be found, after due diligence, within this state, and that deponent is informed and believes that said defendants are now in the city of Laredo, state of Texas." The complaint states that the defendants are, and at all times hereinafter mentioned, were copartners, doing business in the city of Laredo, state of Texas, under the firm name of Tomas Dwyer & Co. :

Held, that this was not sufficient under section 439 of the Civil Code of Procedure to authorize the granting of this order.

At Chambers, December, 1883.

Gilbert R. Hawes, for plaintiff.

Forbes & Sage, for defendants.

LAWRENCE, J.—The application in this case is to vacate an order directing the service of the summons by publication, on the ground that the affidavit on which the same was obtained was insufficient to justify the granting of the order.

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The affidavit recites "that as deponent is informed and believed that the defendants, Tomas Dwyer and Joseph W. Bell, are not residents of this state, but reside in the city of Laredo, state of Texas, as deponent is informed by said defendants themselves in letters received from them at said place." Also, "that deponent has caused a summons and complaint to be issued in this action against the said defendants, to the sheriff of the city and county of New York, but that said defendants cannot be found, after due diligence, within this state, and that deponent is informed and believes that said defendants are now in the city of Laredo, state of Texas." The complaint in the action states that the defendants are, and at all times hereinafter mentioned, were copartners, doing business in the city of Laredo, state of Texas, under the firm name or style of Tomas Dwyer & Co. These are all the allegations in the papers on which the order of publication was granted showing the inability of the plaintiffs, with due diligence, to make personal service upon the defendants of the summons within this state. Under the old Code of Procedure, the affidavit would have been plainly insufficient (*See Wortman agt. Wortman*, 19 *Abb. Pr. R.*, 17, and cases cited in the opinion of SUTHERLAND, P. J.; *Peck agt. Cook*, 41 *Barb.*, 549; *Bixby agt. Smith*, 3 *Hun*, 60, opinion of DAVIS, P. J.). I was inclined on the argument to the opinion that, under section 439 of the Code of Civil Procedure, the affidavit in this case might be deemed to be sufficient, inasmuch as it referred to letters received from the defendants themselves in the city of Laredo. Subsequent reflection and an examination of the section in question lead me to the conclusion that this impression was erroneous. The letters relied on to establish that the defendants were non-residents at the time the order was made are not attached to the affidavits, nor are even their dates given. The reference to them, therefore, in the affidavit furnishes no proof that they establish that the defendants could not, with due diligence, be personally served with the summons in this

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state. In *De Weerth* agt. *Feldner* (16 *Abb.*, 295), the general term of the common pleas held that where documents are relied upon in an affidavit presented for the purpose of obtaining a provisional remedy, the documents themselves or copies thereof must be furnished to the court. In the absence of such letters or copies thereof, the plaintiffs' case was not strengthened upon the question of due diligence by a simple reference to them in the affidavit. The plaintiffs' affidavit, as we have before seen, shows that the summons and complaint had been issued to the sheriff of this county, and alleges that the defendants cannot be found, after due diligence, in this state, and the deponent is informed and believes that said defendants are now in the city of Laredo, state of Texas. It does not state that the sheriff has so informed the deponent, nor does the sheriff make any certificate showing that he has made any efforts to serve the summons and complaint upon the defendants within this state. I cannot, therefore, distinguish this case from that of *Carleton* agt. *Carleton* (85 *N. Y.*, 313). In that case the cases of *Belmont* agt. *Cornen* (82 *N. Y.*, 256) and *Howe Machine Company* agt. *Pettibone* (74 *N. Y.*, 68), which are relied upon by the plaintiffs' counsel, are commented upon and distinguished, and the decision in the former case was supported on the ground that the affidavit therein contained allegations tending to show that an effort had been made to find the defendant within the state and that he was not there, and hence it conferred jurisdiction upon the court or judge to pass upon the question of the sufficiency of the proof, and in the latter case it appeared that there was a certificate of the sheriff that he had used due diligence to find the defendant for the purpose of serving the summons upon him, and that from the best information he could obtain he learned he had left the state. No such feature exists in the case now under consideration, nor, as I view it, is any fuller information imparted by the affidavits than was presented in the case of *Carleton* agt. *Carleton* (*supra*), where the affidavit stated that

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the defendant "has not resided within the state of New York since March, 1877, and deponent is informed and believes that defendant is now a resident of San Francisco, California." The plaintiff relies upon the case of *Smith* agt. *Mahan* (27 *Hun*, 40), decided by the general term of this department. In that case, however, the motion was made by a non-resident and junior attaching creditor, and a *quære* was expressed as to whether the affidavit could have been sustained if the motion had been made by the debtor himself (see opinion of DAVIS, P. J., on concurring in the opinion of BRADY, J.; DAVIS, P. J., and BRADY, J., only being present). I do not regard that case, therefore, as in point, and shall follow the decision of the court of appeals in *Carleton* agt. *Carleton*, already referred to.

Motion granted, with ten dollars costs, to abide event.

SUPREME COURT.

JOHN VAN RAY, respondent, agt. CLARA MORRIS HARRIOT,
appellant.

*Code of Civil Procedure, section 872—Examination of parties before trial—
What must be established by the affidavit—Sufficiency of.*

Though to entitle a party to an order for the examination of the adverse party as a witness it must appear by the affidavit upon which the application is based that there was a *bona fide* purpose to take evidence of the party to use it upon the trial, yet it is not necessary to state it in direct and positive terms. The law will be complied with when that fact shall be made to appear as one that has been established by the evidence,

First Department, General Term, August, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from order requiring the defendant to appear before the court and submit to an examination as a witness before the trial.

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A. J. Dittenhoefer, for appellant.

O'Byrne & Stewart, for respondent.

DANIELS, *J.* — Argument of the appeal in this action was ordered for the reason that the office address of the defendant's attorney was added to his name at the conclusion of the answer served in the action, and the answer as well as the complaint were made a part of the application upon which the order for the examination of the defendant was made. But whether this addition would be a compliance with the provisions of section 872 of the Code, directing that the affidavit shall set forth the residence or office address of the attorney, is a point which certainly would admit of grave doubt, for the section has been framed in such a manner as to render the intention apparent that this statement shall be made and verified as a part of the affidavit itself; but it is not necessary for the disposition of this case decidedly to determine this point, for if it could be held to be an irregularity in the proceeding, the papers, as they have been presented upon the appeal do not permit the defendant to take advantage of it. For this omission in the affidavit does not appear to have been specified in the notice of motion or the order to show cause upon which the motion was heard and decided, as that has been required by Rule 37 of the general rules of practice, and for that reason the point is not properly before the court whether the affidavit was or was not sufficient upon this subject. From the terms of the order, the motion appears to have been disposed of upon its merit rather than by any specific objection to mere defects, whether formal or substantial, in the affidavits, and as the notice of motion or order to show cause was not made a part of the papers on the appeal, the case requires to be considered in the same manner at the present time.

The principal objection taken to the affidavits is that it was not made to appear that there was a *bona fide* purpose

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to take the evidence of the defendant to use it upon the trial, and by section 872 of the Code that is required to be shown in such an application as the present one to entitle the party to an order for the examination of the adverse party as a witness. But it has not been rendered necessary to state that in positive and direct terms. The law will be complied with when that fact shall be made to appear as one that has been established by the affidavits, and no more than that is required by the case of *Chapin agt. Thompson* (16 Hun, 53). The affidavits upon which the order was made state that the plaintiff is unable to prove the number of times the dramatic composition in controversy has been produced and represented upon the stage by the defendant, under the agreement made with her by the plaintiff's assignor, and for which she promised and agreed to pay a royalty of ten dollars for each and every representation of the performance by her. These representations have been made in various places, and the knowledge of the number is a fact peculiarly with the defendant. The proof of this fact is essential to the right of the plaintiff to maintain the action, and the affidavits indicate it to be probable that this proof can be obtained from no other source than from the defendant herself. And for that reason the plaintiff has stated that he cannot safely proceed to the trial of the action without her testimony, and that it is material and necessary for him in the prosecution of the action. It is to be reasonably inferred from these circumstances that it is not simply the purpose of the plaintiff to discover what the defendant may be able to swear to as a witness in her own behalf that her examination has been applied for, but for the purpose of acquiring the evidence necessary for him in bringing the action to trial. And for that purpose and that extent he has, under the circumstances, a right to take the testimony of the defendant as a witness for himself before the trial of the action. The defendant has been a difficult person to find and serve with papers in the action, and to obtain her evidence the plaintiff has observed

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all the diligence which reasonably strict practice could exact from him for the attainment of this object.

The order in the case as it has been presented by the appeal should be affirmed, together with the usual costs and disbursements upon the appeal.

DAVIS, P. J., and BRADY, J., concur.

CITY COURT OF NEW YORK.

HENRY M. GESCHEIDT agt. STEPHEN G. QUIRK.

New trial — When will be denied — Practice.

Although where the defendant sets up the defense that the demand on which the action was founded "has been bought and sold or received for prosecution" by an attorney and counselor, contrary to the statute (2 R. S., 71 *et seq.*), the court, and not the jury, are to pass upon the question. If determined against the plaintiff, he must be non-suited, and if in his favor the jury must be instructed accordingly; yet the plaintiff cannot invoke its aid if he neglects to avail himself of, or to perform, the requirements of this rule, or if he waives the right it confers.

Where the plaintiff did not request the court to direct the jury to find for him, he cannot complain because the defendant did not deem it to be his duty to move for a nonsuit, and having conceded the affirmative to the defendant the plaintiff was the first to go to the jury, to whom he voluntarily submitted his case and they having found against him, and he must abide by their verdict.

Where such a defense is made out and the question of interest is for the court and not for the jury, an absolute judgment in favor of the defendant, as distinguished from a judgment of nonsuit, is proper.

Special Term, December, 1883.

MOTION for a new trial upon the minutes.

H. M. Gescheidt, for plaintiff.

J. B. Leavitt, for defendant.

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HYATT, J. — This action was brought by the plaintiff as the indorsee of a certain promissory note against the maker, who interposed the statutory defense, that the plaintiff, as an attorney and counselor at law bought the note in question with the intent and purpose of bringing an action thereon (2 R. S., 288, *sec.* 71). Upon the trial the defendant was conceded the affirmative and called the plaintiff as his witness to establish the defense; the plaintiff subsequently testified in his own behalf; the case was submitted to the jury, after the summing up by counsel, without either party taking an exception or making a request; the jury found a verdict for the defendant.

The plaintiff now urges that if this peculiar defense was established he should have been nonsuited, and if not established that a verdict should have been directed in his favor, relying upon the rule as laid down in the case of *Orcutt* agt. *Pettit* (4 *Denio*, 233).

Admitting the soundness of this authority, yet the plaintiff cannot invoke its aid if he neglects to avail himself of, or to perform, the requirements of this rule, or if he waives the right it confers.

The plaintiff did not request the court to direct the jury to find for him and he certainly cannot complain because the defendant did not deem it to be his duty to move for a nonsuit; having conceded the affirmative to the defendant the plaintiff was the first to go to the jury, to whom he voluntarily submitted his case, they found against him and he must abide by their verdict.

But even if counsel had pursued the course suggested by the rule in the case of *Orcutt* agt. *Pettit* (*supra*), nevertheless it is doubtful if he would be entitled to the relief he asks for. In the case of *Mann* agt. *Fairchild* (3 *Abb. Ct. of App. Dec.*, 161), where the issue was the same as in the case at bar, the court held that when such a defense is made out and the question of interest is for the court and not for the jury,

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an absolute judgment in favor of the defendant, as distinguished from a judgment of nonsuit, is proper.

The plaintiff, however, is not prevented by reason of his conduct of the trial of the action from moving upon the minutes to set aside the verdict, as founded upon insufficient evidence (*Kelly* agt. *Frazier*, 27 *Hun*, 314), but after a careful examination of the minutes of testimony I am satisfied that there is evidence in the case to sustain the finding of the jury, and I do not feel justified in setting aside the verdict, either as unsupported by, or clearly against the weight of evidence (*Samuels* agt. *Weaver*, *Weekly Dig.*, 272).

Motion for a new trial denied, with ten dollars costs.

SUPREME COURT.

SIMON J. M. BEAR agt. THE AMERICAN RAPID TELEGRAPH COMPANY and others.

Corporations — Trustees — Contracts — Syndicate agreement — Rights of parties under — Parties — Practice.

The plaintiff, with others, owners and inventors of appliances in telegraphy, in December, 1878, entered into a syndicate agreement, and defendants Angle and Craig, as trustees of the syndicate, issued to plaintiff a certificate for twenty shares of its stocks. The defendant Wallace was afterwards joined as trustee with Angle and Craig. The defendant Telegraph Company was organized soon after, and its 30,000 shares of stock distributed equally among three trustees, its corporators, one of whom was defendant Wallace. The syndicate inventions and patents were transferred by Angle, Craig and Wallace for 20,000 shares of the company's stock to the three trustees of the defendant company, Read, Brown and Wallace, who at the same time transferred them to the company. After the company had gone into operation, a certificate for the 20,000 shares due the trustees of the syndicate was made out, but was never issued to them. In this action to assert plaintiff's title in the trust property as member of the syndicate :

Held, that the corporation was chargeable, not only by the connection of Wallace with its organization, but by the fair inference to be drawn by

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the course of dealing with the several parties, with knowledge of the representative character of the persons with whom it was dealing ; that there has been a plain violation, through the instrumentality of the trustees, and by their misconduct or the misconduct of some of them, of the rights of the beneficiaries under these contracts, and that plaintiff is entitled to the relief sought.

The practice does not permit a defendant, even though he has concealed in his answer a counter-claim, to stand by and permit the plaintiff to proceed as though no counter-claim were pleaded, and thus attempt to take advantage of the omission to file a reply by moving to dismiss the plaintiff's complaint.

Special Term, December, 1883.

James Armstrong, for plaintiff.

Alexander & Green, for defendant the American Rapid Telegraph Company.

William A. Boyd and *Ewing & Southard*, for defendant Horatio G. Angle.

Thomas Thacher, for defendants Craig and Wallace.

Erastus New and *William A. Beach*, for defendants Church and Rice.

MACOMBER, J.—This action is brought by the plaintiff as one of the *cestui que trusts*, in behalf of himself and his co-beneficiaries, against the trustees and the party to whom the trustees have disposed of the trust property.

At the trial and after the close of the plaintiff's case, counsel for the defendant company and for the defendants Craig and Wallace, moved for a dismissal of the complaint on various grounds.

The motion was formally denied, and thereupon they declined giving any evidence in the case, and resting upon what they deemed to be omissions and deficiencies in the plaintiff's case, submitted their rights as the case then stood.

I refer to my findings for the facts in detail. For the pur-

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pose of considering the argument of the defendants' counsel and the elaborate briefs submitted on all sides in the case, the following summarized statement of the facts is perhaps sufficient :

On the 11th day of December, 1878, the defendants Craig Foot and Randall were the owners of certain discoveries and inventions in the art or science of conveying intelligence by electricity. The plaintiff Bear also had obtained a patent of an invention known as an improvement in the Terraqueous telegraph, and had on file in the proper office at Washington, a caveat for another invention known as the Telegraphone. On that day, namely, the 11th day of December, 1878, these parties entered into what is known as a syndicate agreement, which is set forth in the case. Angle and Craig entered upon the discharge of their obligations, in pursuance of such agreement, and on the 23d day of December, 1878, they issued to the plaintiff a certificate for twenty shares of the syndicate stock. On the 9th day of January, 1879, the plaintiff and Randall and Foote executed a paper or letter addressed to Horatio G. Angle and Daniel H. Craig, describing them as trustees under the contract of December 11, 1878, and authorizing and requesting them to purchase and consolidate into the American syndicate of telegraph patents, created by the contract of December 11, 1878, the American compound telegraph wire for the uses of said syndicate, and authorizing them for that purpose to take into their number another trustee to aid in the management of the matter, to wit, either Chester Snow or Thomas Wallace.

The defendant company was organized as a corporation under the laws of the state of New York on the 24th day of February, 1879, for the purpose of purchasing or acquiring control of the rights, interests, privileges and property in the trust, and of building and operating telegraph lines therefor. Its capital stock upon its organization was divided into 30,000 shares of the par value of \$100 each, and was distributed among James M. Brown, Edwin Read and Thomas Wallace,

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its incorporators, in lots of 10,000 shares each. Thomas Wallace above mentioned was a director of the company. In pursuance of the letter the defendants Craig and Angle purchased for the benefit of the trust the said wire interest, and did associate with themselves the said Thomas Wallace, who accepted the appointment under the terms set forth in the agreement of March 14, 1879, between the Telegraph Construction Company and Angle, Craig and Wallace. The instrument, by which the inventions and patents held by Angle and Wallace, as trustees, were transferred to Read, Brown and Wallace, bears date March 28, 1879.

On the same day Read, Brown and Wallace transferred the same inventions and patents to the defendant the American Rapid Telegraph Company. The telegraph company afterwards made a contract with said Craig to build its line from New York to Boston. The capital stock of the company was increased to \$4,000,000 on March 25, 1880, and \$10,000,000 on March 9, 1881.

It is apparent that the two contracts, both bearing date March 28, 1875, are parts of the same transaction by which the American Rapid Telegraph Company purchased the entire trust property and became indebted therefor to the defendants, Angle, Craig and Wallace, as trustees. The corporation was chargeable not only by the connection of Wallace with its organization, but by the fair inference to be drawn by the course of dealing with the several parties, with knowledge of the representative character of the persons with whom it was dealing. It is claimed by the learned counsel for the defendants that the company was in no way bound to regard the rights of the syndicate trustees.

In this I cannot agree with them, nor in their position, that all the company need do was to see that the number of shares contracted for were in form transferred to the trustees. It does, indeed, appear that Angle, Craig and Wallace received these shares of stock, if the mere recital in the receipt is sufficient to show such fact to exist. But it is quite apparent

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from the proof and admission in the pleadings, that the stock, nearly all of it, went back simultaneously into the hands of the company. By the answer itself of the defendant corporation the 30,000 shares were issued for the use of the trustees, upon the understanding and agreement that 9,970 shares should be forthwith returned to the treasury for working capital, and 20,000 shares should be retained by it, to be held to await the result of the examination as to value and title, and to be thereafter distributed. Without going into the details of the case further upon this branch of it, it is apparent, in the absence of proof explaining the conduct of the company and extenuating the acts of the trustees, that there has been a plain violation, through the instrumentality of the trustees, and by their misconduct or the misconduct of some of them, of the rights of the beneficiaries under these contracts.

As the case stands, therefore, I do not see that the court has any discretion to withhold from the plaintiff the relief sought, which is placed upon the ground of the misconduct of the trustees through the connivance of the corporation, which had full knowledge of the duties and obligations of the trustees to their *cestui que trust*.

It does not appear that the defendant Angle, who has died since the action was begun, has been guilty of any active violation of his duty. But it does appear that he had refused to become a party plaintiff to the action, and he was properly therefore made a party defendant.

The other questions in the case are not of difficult disposition. It is contended that the defendant company is entitled to an affirmative judgment against the plaintiff upon the inspection of its answer, which contains, as is alleged, a counter-claim. It is true that the matter pleaded is stated to be for answer and by way of counter-claim. There is no separation of the counter-claim by separate numbering from the defenses and denials, and no special affirmative relief is asked for in the prayer.

I do not understand that the practice permits a defendant,

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even though he has concealed in his answer a counter-claim, to stand by and permit the plaintiff to proceed as though no counter-claim were pleaded, and so attempt to take advantage of the omission to file a reply at the close of the plaintiff's case, and upon an application to dismiss the complaint. If it were necessary, I should deem it the duty of the court, in the exercise of its discretion, to permit a reply, which, in this case, would be the sheerest formality, to be filed *nunc pro tunc*.

Furthermore, I do not think the agreement contained in what is known as the arbitration clause, can stand in the way of the relief here sought by the plaintiff. That agreement was to the effect that the product of the trust property was to be apportioned among the different patents and inventions, and to be divided among the beneficiaries by their trustees. There is not a defect of parties. It appears that Mr. Angle declined to be a party plaintiff, and for that reason was properly made a party defendant. Mary E. Foote was not a party to the syndicate agreement of December 14, 1878. Edwin Reade was made a party by the service on him of an order. The affidavits and the order by which he was brought into the case show that Foote and Randell are no longer interested parties, and Reade himself has made default.

In the absence of any plan of a defect of parties, I do not think that the court has any reason to bring in other persons than those already before it for a full and complete judgment.

I should have preferred that the defendants had produced their proofs before me, rather than to be obliged to pass upon a case of this magnitude upon a partial presentation of the facts thereof. Nevertheless, I do not see that I have any discretionary power to withhold from the plaintiff the judgment which these facts show he is entitled to.

Andrews agt. Prince.

SUPREME COURT.

CONSTANCE A. ANDREWS, plaintiff and appellant, agt. JOHN D. PRINCE and others, defendants and respondents.

Examination before trial — Of a party in action resting upon fraud, will not be ordered when this object is to procure testimony to establish such fraud — Code of Civil Procedure, section 880.

In actions resting upon fraud, deceit and fraudulent conspiracy, an order for the examination of a party defendant before trial will be vacated when the object of it is to procure testimony to establish the fraud.

First Department, General Term, December, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order vacating an order for the examination of James R. Keene, one of the defendants, as a party before trial.

Harry Wilbur, for appellant.

William G. Choate, for respondent.

BRADY, J. — This action is one which, under the old system, would be embraced with those designated as actions on tort, and rests upon charges of fraud and deceit for the purpose of obtaining money. The first allegation in the complaint is that the defendants and others unknown to the plaintiff, for the purpose of obtaining money by fraud and deceit, on or about a certain day procured the organization of two companies; and it is further charged that in pursuance of such fraudulent and deceitful purpose the defendants did certain things particularly set out, and, further, that the money received from the plaintiff was received in pursuance of the purpose for which the company was organized and the representations made. The action is, therefore, one which rests entirely upon charges of fraud, deceit and fraudulent conspiracy. It seems to be well settled that in such an action an order for the

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examination of the party will be vacated when the object of it is to procure testimony to establish the fraud charged. This doctrine rests upon the provisions of the constitution of this state, which declares that no person shall be compelled, in any criminal case, to be a witness against himself. *Yamato Trading Company* agt. *Brown* (decided in this department and reported in 25 Hun, 248) is in point upon the question involved upon this appeal, in which it was decided that when the object of the examination, as already suggested, is to show by the testimony of the party that he procured property from the plaintiff by means of false and fraudulent representations the order for his examination should be vacated (See, also, *Kenny* agt. *Roberts*, 26 Hun, 166; *Corbett* agt. *De Comean*, 5 Abb. N. C., 169; *Burbank* agt. *Reed*, 11 N. Y. Weekly Dig., 576).

The case of the *Canada Steamship Company* agt. *Sinclair* (reported in 3 Civil Pro., 285) is not in conflict with the cases referred to. But if it were it would not be regarded as overruling (being a special term case) the decision of the general term of this department. That case, however, is distinguishable from this, in that it was commenced to recover property or its value, and the object of the examination was to show how much of the property which was stolen from the plaintiffs came into the possession of the defendant.

The court held that the possession of the goods is not of itself a crime. It was necessary if they were bought by the defendants to show that they were purchased with a knowledge of their being stolen. If the proposition was recognized, as it should have been, that if it appeared that the testimony which the party sought related exclusively to frauds, which amounted to a crime, the order could not be maintained.

For these reasons the order appealed from was properly made and should be sustained.

The judgment of the court is, therefore, that the order appealed be affirmed, with ten dollars costs and disbursements.

DAVIS, P. J., and DANIELS, J., concurred.

King agt. Southwick *et al.*

N. Y. COMMON PLEAS.

BENJAMIN W. KING agt. AMOS A. SOUTHWICK *et al.*

Attachment—An affidavit on an application for an attachment which states the cause of action on information and belief is insufficient—Code of Civil Procedure, sections 635, 636.

In an affidavit on an application for an attachment the *cause of action* was stated on *information and belief*, but the *non-residence* of the defendants was alleged *positively*. On motion to vacate the attachment:

Held, that the cause of action being stated on information and belief, and the sources of the information not being given, the attachment must be vacated. Such a verification is proper in a pleading but not in an affidavit to obtain an attachment.

Special Term, January, 1884.

MOTION to vacate an attachment.

The affidavit upon which the attachment was issued alleged, first, upon information and belief, a cause of action against the defendants for a conspiracy to defraud; and, second, positively that the defendants were non-residents. The motion to vacate the attachment was made upon the papers upon which it was granted.

Oswald Prentiss Backus, for motion, argued that the cause of action must be proved, and that an allegation upon information and belief is insufficient, and cited on applications for attachment: *Code of Civil Procedure* (secs. 635, 636); *Smith agt. Luce* (14 Wend., 239); *Ex parte Haynes* (18 Wend., 611); *Pierse agt. Smith* (1 Minn., 60 [82]); *Hill agt. Bond* (22 How., 272); *St. Arnaud agt. De Beixcedon* (3 Sandf. [S. C.], 703); *Brewer agt. Tucker* (13 Abb., 76); *Lawton agt. Kiel* (51 Barb., 32); *Yates agt. North* (44 N. Y., 271, 274); *Steuben County Bank agt. Alberger* (78 N. Y., 258); *Ackroyd agt. Ackroyd* (11 Abb., 345); *Castellanos agt. Jones* (5 N. Y., 164, 168); *Donnelly agt. Corbett* (7 N. Y., 500, 507). Arrest and bail: *Code of Civil Procedure* (549, 557); *De Nierth*

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agt. *Sidner* (25 *How.*, 419); *Whitlock* agt. *Roth* (5 *How.*, 143); *Blason* agt. *Bruno* (21 *How.*, 112); *Dreyfus* agt. *Otis* (54 *How.*, 405); *Saton* agt. *Reisenberger* (25 *How.*, 164); *Crandall* agt. *Bryan* (15 *How.*, 48); *Adams* agt. *Mills* (3 *How.*, 219); *Pierson* agt. *Freeman* (77 *N. Y.*, 589). Injunctions: *Code of Civil Procedure* (secs. 603, 604, 607); *Crocker* agt. *Baker* (3 *Abb.*, 182); *Pomeroy* agt. *Hindmarsh* (5 *How.*, 437); *Conkey* agt. *Dike* (17 *Minn.*, 459).

Julius M. Ferguson, opposed.

J. F. DALY, *J.* — The motion to vacate an attachment must be granted. The whole cause of action (which is for conspiracy and fraud) is stated on information and belief, and the sources of information are not given. Such a verification of the cause of action is proper in a pleading, but is not proper in an affidavit upon an application to obtain an attachment. Ten dollars costs to defendant.

SUPREME COURT.

THOMAS S. GRIMWOOD, respondent, agt. WILLIAM M. WILSON *et al.*, appellants.

Undertaking on appeal — To be executed by at least two sureties — Defective when signed by two sureties, one of which is plaintiff — Code of Procedure, sections 348, 335 — Code of Civil Procedure, sections 1327, 1334.

Where a person signs an undertaking given on appeal in an action as surety, with the express understanding that it was to be executed also by another surety, and the law requires two sureties to an undertaking that would operate as a stay, such surety is not liable on the undertaking if it be filed without a second surety being obtained.

First Department, General Term, December, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

Grimwood agt. Wilson *et al.*

APPEAL from judgment, entered upon decision of the court at circuit without a jury.

Sidney Harris, for appellant.

Wilbur F. Scott, for respondent.

DAVIS, *P. J.* — This action was brought upon an undertaking, given on appeal to the general term of this court, in an action of *Grimwood agt. Urbin*, the co-defendant of the appellant. The undertaking was executed by Urbin, the appellant in that suit, and Wilson, the present appellant. The defense interposed was to the effect that when Urbin applied to Wilson to execute the undertaking he requested him to be one of two sureties therein; that Wilson declined, but, upon Urbin's representation that one Charles F. Hunter, president of the People's Bank, or some other responsible person, would execute the undertaking as the other surety. Wilson signed, on condition that Mr. Hunter or another responsible surety should execute the same. The undertaking executed by Urbin and Wilson alone was afterwards filed, no second surety having been obtained. The judgment appealed from was subsequently affirmed, and this action was brought against Urbin and Wilson upon the undertaking.

The only evidence in the case was that of the defendant Wilson and his son, whose testimony tended to show that Wilson executed the undertaking upon the condition that Mr. Hunter or some other responsible person should sign the same as co-surety with him.

There was no evidence in the case tending to show that Wilson had in any form consented to waive the execution of the instrument by another surety, or that he knew the fact that it had been filed without obtaining such surety. Upon filing the undertaking a copy thereof was served upon the plaintiff's attorney, and no steps were thereafter taken to require the surety to justify or to enforce the judgment pending the appeal.

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The undertaking was made at a time when the old Code was in operation. Section 335 of that Code provided that an appeal from a judgment directing the payment of money should not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant by at least two sureties. The fact that Urbin, the appellant, also executed the undertaking was not a compliance with this requirement (*Moss agt. Hasbrouck*, 63 *How.*, 84). He was not a "surety" within the meaning of the Code, and could not be made one, because he was the principal against whom the judgment had been recovered, and incurred no additional liability by the execution of such an undertaking.

The court below refused to find upon the evidence, the facts which the evidence tended to establish, and being uncontradicted did establish, and exceptions were taken to such refusal. This refusal was undoubtedly made upon the ground that the execution and filing of the undertaking were such acts as precluded the appellant Wilson from proving the alleged defense, to wit, that he executed upon condition that another surety should be obtained. It seems to be very well settled in this state that where a surety signs a bond upon condition that it is not to be delivered until another person becomes a party to it, the delivery in violation of that condition will not be effective against him (*People agt. Bostwick*, 32 *N. Y.*, 445; *Bookstaver agt. Jayne*, 60 *N. Y.*, 150; *Benton agt. Martin*, 52 *N. Y.*, 570, 574).

The case of *The People agt. Bostwick* was questioned by the same court in *Russell agt. Freer*, but it was not necessarily overthrown, because the court held that the facts of *Russell agt. Freer* did not bring the case within the principle of *The People agt. Bostwick*.

In this case the appellant had a perfect right to require that the undertaking should be executed by another surety, because the Code itself expressly requires that the instrument should have at least two sureties in order to be of any effect; and where such an instrument is executed upon that express

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condition or understanding, we see no good reason why the principal and the party in whose favor it is made should be at liberty, by waiving the requirements of the statute, to fix a liability upon the appellant greater than that which a compliance with the statute, and with the conditions upon which he signed the instrument, would impose.

The undertaking was of no operative effect to stay proceedings upon the judgment, unless it could be made so by the waiver of the plaintiff in the judgment to enforce his statutory rights; but that waiver could not get rid of the condition which the plaintiff had attached to his execution and to the delivery of the undertaking. Parties must be presumed to know the law. And, therefore, the surety in this case may well be presumed to know that the instrument he had signed would not be operative until another surety had joined in it. There was nothing unreasonable, therefore, in the evidence which tends to establish that the undertaking was not to be delivered until another party would join, and that the execution by the appellant was upon that condition.

The plaintiff also must be presumed to know that the law requires two sureties to an undertaking that would operate as a stay, and if he, therefore, of his own motion, chose to waive that requirement and to accept the instrument with one surety, he ought at least to have been sure that the single surety had consented to accept the responsibility thrown upon him by the absence of another surety.

We think the judgment should be reversed and a new trial ordered, with costs to abide the event.

BRADY, J., concurred.

DANIELS, J. — As the plaintiff was deprived of no right, nor delayed in the collection of the judgment by the giving of the undertaking, the failure to comply with the conditions imposed by the defendant subscribing it as a surety was a defense. If in the form in which it was filed it would have created a stay, then the surety would probably be precluded

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by that circumstance from denying his liability upon it. But it did not. As there was but one surety it did not stay, or in any form prevent the plaintiff from collecting his judgment (*Code Pro.*, secs. 348, 335). I agree, therefore, with the opinion of the presiding justice.

N. Y. SUPERIOR COURT.

DANIEL DE LEON agt. DAVID A. DE LIMA.

*Examination of party before trial — When order for, should not be granted —
Code of Civil Procedure, section 870.*

An order should not be granted to examine a defendant before trial, in a suit for damages for alleged slander, to obtain knowledge or information of the exact language used by him in disseminating a charge that plaintiff had participated in a scheme of blackmail against defendant. To entitle a party to an examination of a defendant it must appear that plaintiff has a cause of action against the defendant. Such examination will not be allowed for the purpose of informing plaintiff whether he has such a cause of action or not.

Special Term, January, 1884.

MOTION to vacate order for the examination of the defendant, sought for the purpose of framing the complaint.

Frederick R. Coudert, for motion.

Beno Loewy, opposed.

INGRAHAM, J. — This action is brought to recover damages for alleged slander.

The object of the examination, as stated in the affidavit on which the order was granted, is to obtain knowledge or information of the exact language used by defendant in disseminating a charge that plaintiff had participated in a scheme of

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blackmail against the defendant. The sole object of the examination is therefore to compel the defendant to testify as to his guilt of the offense charged.

In considering the provisions of the Code allowing the examination of a party before trial, it has been held that such proceedings are a substitute for a bill of discovery under the former practice, which was abolished by the Code of Procedure, and the rules adopted by the courts in an action for a discovery have been applied to such proceedings (*Glenny agt. Stedwell*, 64 *N. Y.*, 120).

In *Bailey agt. Dean* (5 *Barb.*, 297) it was held that a party should not be compelled to disclose facts to enable a plaintiff to sustain an action for slander. I have been unable to discover any cause in which this rule has been departed from, and it was substantially followed in *Phoenix agt. Dupuy* (7 *Daly*, 238). There is another objection to the affidavit on which the order was granted that is also fatal to the order.

To entitle a party to an examination under this provision, it must appear that plaintiff has a cause of action against the defendant. Such an examination will not be allowed for the purpose of informing plaintiff whether he has such a cause of action or not. A fishing excursion was never allowed.

Here plaintiff's only allegation that would go to show that defendant had slandered the plaintiff was the statement of Inspector Byrnes that defendant had charged plaintiff with being participant in the scheme, and that suspicion rested on plaintiff because, as defendant had informed the inspector, plaintiff had refused to go to the park when he wanted plaintiff to go, and that defendant and family broke off intercourse with plaintiff.

The only statement that it is alleged the defendant has made was that plaintiff would not go to the park, and it can hardly be said that such a statement was slanderous.

I do not think that there is any cause of action shown, nor do I think that on such a statement plaintiff should be allowed to compel the defendant to spread on the record every word

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that he uttered to his family and the police officers, under circumstances detailed in the affidavit.

Motion to vacate order for the examination of defendants granted.

SUPREME COURT.

In the Matter of the Judicial Settlement of the Account of ISAAC F. BROWN, as executor, &c., of DEBORAH ORSER, deceased.

Will — probate of — When legacy to a subscribing witness void.

Where there were but two subscribing witnesses to a will, to one of which a legacy was left, and the will could not be proven without the testimony of such legatee:

Held, that the legacy to him was void.

Second Department, General Term, January, 1884.

Before BARNARD, P. J., PRATT and DYKMAN, JJ.

THE will of deceased was proved in March, 1880, before the surrogate of Westchester county. The decree on the accounting of the executor, Isaac F. Brown, adjudged that the bequest in the will to said Brown of one-half part of her residuary personal property was void, and ordered the distribution of that share to the next of kin of testatrix, in the same manner as if she had died intestate, on the grounds appearing in the opinion. The said Brown, the executor and devisee, appealed from the decree.

Nelson H. Baker and Francis Lattin, for appellant.

Charles M. Hall, for next of kin, respondents.

BARNARD, P. J. — Deborah Orsor, by her last will and testament, gave her residuary estate to Isaac F. Brown and Margaret Miller. The same persons were made executors. There were two witnesses to the will, Isaac F. Brown and

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Daniel B. Foster, both lived in this state, and both were examined upon the proof of the will and there were but these two witnesses to the will. The statute, upon the subject presented, is as follows:

“If any person shall be a subscribing witness to the execution of any will wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void only so far as concerns such witness or any claiming under him, and such person shall be compellable to testify respecting the execution of the said will in like manner as if no such devise or bequest had been made” (2 *R. S. [Edm.]*, 95, *sec.* 50).

The will could not be proven without the testimony of Brown. Two witnesses at least are required to a will. This probate required both witnesses to be produced and examined. “Two, at least, of the witnesses to such will, if so many are living in this state, and of sound mind, and are not disabled from age, sickness or infirmity from attending, shall be produced and examined” (2 *R. S. [Edm.]*, 67, *sec.* 62).

As to Brown, the legacy was void. A surrogate may believe one witness and not the other, and thus it is claimed that a will can be proven without two witnesses. In fact, the statute does not mean this. A will must have two witnesses, and both must be sworn to prove a will, with certain exceptions, which do not include the present case. The testimony of the witness of necessity must be given; the will cannot be proven without it, and the legacy, consequently, is void. The subsequent legislation in reference to the examination of interested witnesses does not repeal by implication these statutes. Such repeals are not favored, and there is no inconsistency in both statutes standing together.

The surrogate's decree appealed from should be affirmed, with costs against the appellant.

PRATT and DYKMAN, JJ., concur.

Matter of Ranney.

N. Y. SURROGATE'S COURT.

In Matter of the Estate of ALFRED A. RANNEY.

Executors — Accounting by executor, &c., of deceased executor — Representatives of a deceased executor cannot initiate such proceedings — Code of Civil Procedure, section 2606.

A proceeding may be brought in this court by or against the executor or administrator of decedent A., who was himself the executor or administrator of decedent B., for an accounting with respect to decedent A.'s estate. The parties interested in the estate of decedent B. will be entitled upon such accounting to assert, in common with the other creditors of A., such claims as they may have against his estate on account of any liability he may have incurred by reason of his administration of B.'s estate.

But there is no provision of law which authorizes the representatives of a deceased executor or administrator to initiate and conduct a proceeding for the accounting of their decedent in the estate whereof he was himself executor.

January, 1884.

ROLLINS, S. — This is a proceeding instituted by the executor and executrix of the late Lafayette Ranney, who in his lifetime was this decedent's executor. It has for its object the judicial settlement of the account of Lafayette Ranney as such executor of Alfred A. Ranney, the decedent. Upon the filing of the petition herein, citations were issued to all parties interested in the estate, except the administratrix with the will annexed, who had not been granted letters as such. She subsequently appeared by her attorney, who, now, after a spirited contest over the petitioners' accounts has reached its close, and just as a decree is about to be entered, presses upon the attention of the court an objection to its jurisdiction to entertain these proceedings, and moves that they be dismissed. In neglecting until the last stage of this proceeding to urge the objection upon which he now relies, counsel's conduct may perhaps be open to criticism, but the objection

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must nevertheless be considered, and if well founded must be sustained, even though as a result it should appear that the proceedings has been from the outset void for lack of jurisdiction.

I am forced to hold that such is the case. There is no warrant in the Code for any proceeding like that which is now the subject of consideration. It is not within the purview of section 2606. That section simply provides for an accounting by an executor or administrator of a decedent who was himself in his lifetime the executor or administrator of another, as to such assets of that other, and such only as have come into his own hands, and it confers power to initiate such an accounting, proceeding only upon the successor of the first decedent's executor or administrator, or upon a surviving associate of such executor or administrator, or upon a creditor of the first decedent or a person interested in his estate. There is no provision of law which authorizes the representatives of a deceased executor to initiate and conduct a proceeding for the accounting of their decedent in the estate whereof he was himself executor (*Spencer* agt. *Popham*, 5 *Redf.*, 428; *Popham* agt. *Spencer*, 4 *Redf.*, 401).

A proceeding may be brought in this court by or against the executor or administrator of decedent A., who was himself the executor or administrator of decedent B., for an accounting with respect to decedent A.'s estate. The parties interested in the estate of decedent B. will be entitled upon such accounting to assert, in common with the other creditors of A., such claims as they may have against his estate on account of any liability he may have incurred by reason of his administration of B.'s estate (*See* *estate of Charlck*, *N. Y. Surrogate's decision*, 1883, p. 388; *Estate of William E. Lawrence*, *N. Y. Surrogate's decisions*, 1883, p. 169; *Dakin* agt. *Dening*, 6 *Piage*, 95; *Montross* agt. *Wheeler*, 4 *Lans.*, 99; *Farnsworth* agt. *Oliphant*, 19 *Barb.*, 39). This is not such a proceeding. It was commenced for the purpose of adjusting the accounts of Lafayette Ranney, as they concerned

The People *ex rel.* Second Avenue R. R. Co. agt. Com'rs of Public Parks.

the estate of his testator, Alfred A. Ranney, and as incident thereto for the distribution of the assets of Alfred A. Ranney's estate. Such a proceeding is not authorized by law. It must therefore be dismissed.

SUPREME COURT.

THE PEOPLE *ex rel.* SECOND AVENUE RAILROAD COMPANY,
relator, agt. THE BOARD OF COMMISSIONERS OF THE DEPARTMENT OF PUBLIC PARKS, respondents.

Certiorari — *When motion to quash shall be disposed of upon the merits.*

Though some of the grounds upon a motion to quash a writ of *certiorari* may be well taken, the case should be disposed of upon the merits where quashing the writ would simply remit the parties to another proceeding, and would necessarily result in greater delay.

First Department, General Term, December, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPLICATION for a writ of *certiorari*.

E. L. Fancher, for relator.

Burton N. Harrison, for respondent.

PER CURIAM. — On the hearing of this case a motion was made to quash the writ and to dismiss the proceeding upon several grounds, which were fully presented by counsel for the respondents. Some of these grounds may be well taken, but we think the case should be disposed of upon the merits, inasmuch as quashing the writ would simply remit the parties to another proceeding and would necessarily result in greater delay.

An examination of this case has led us to the conclusion that the commissioners of public parks had jurisdiction of the

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subject matter of the proceeding which this *certiorari* was brought to review, and that their determination was correct.

In reference to the main question in controversy between the parties to this proceeding, we have been furnished with a copy of the opinion of Mr. Charles O'Connor, which, we think, clearly presents the views by which the determination of this matter should be governed. We regard his opinion as one which needs no elaboration, and as this opinion, in case the proceedings should be carried to the court of appeals, will no doubt be laid before that tribunal, we deem it unnecessary to present any independent views on the subjects discussed by him. This will enable the parties to have an earlier decision in the court of last resort than could otherwise be given.

CITY COURT OF NEW YORK.

WILLIAM McSHANE *et al.*, plaintiffs and respondents, agt.
PHILIP BRAENDER, defendant and appellant.

Affirmative of the issue — Right to open and close — Effect of immaterial denials.

The plaintiffs sued to recover the amount of a promissory note made by the defendant to the order of McS. & Co. and delivered to the plaintiffs. The answer denied each and every allegation in the complaint contained except as thereafter admitted. It then alleges, among other things, that the defendant "gave the plaintiffs a note for \$2,054," and "the note set forth in the complaint was the final renewal of said note." The answer then attacks the consideration of the note and pleads other facts in defense to it.

Held, that the defendant should have been awarded the affirmative of the case and the right of opening and closing to the jury, and the denial was error for which the judgment should be reversed.

General Term, November, 1883.

Bartlett, Wilson & Hayden, for appellant.

T. C. Ennever, for respondent.

McShane *et al.* agt. Braender.

McADAM, J.—The plaintiffs sued to recover the amount of a promissory note made by the defendant to the order of William McShane & Co., and delivered to the plaintiffs. The answer denied each and every allegation in the complaint contained, except as thereafter admitted. It then alleges, among other things, that the defendant “gave the plaintiffs a note for \$2,054,” and “that the note set forth in the complaint was the final renewal of said note.” The answer then attacks the consideration of the note, and pleads other facts in defense to it. After the jury had been called and sworn, the counsel for the defendant moved that his client be awarded the affirmative of the case, with the right of opening and closing to the jury. The motion was denied and the defendant excepted. The plaintiffs’ counsel then stated to the jury that the action was on a promissory note for \$2,054, and that “the making of the note was admitted by the answer.” He then put the note in evidence and rested his case. The defendant conceded that the plaintiffs had nothing to prove, and the plaintiffs’ counsel by his admissions and acts demonstrated that the defendant was right in claiming the affirmative. The plaintiff offered no evidence; having the admitted note marked as an exhibit scarcely rises to the dignity of necessary proof. The plaintiffs counsel contends that the answer did not specifically admit that the plaintiffs were the owners of the note, nor that they were the payees intended by “William McShane & Co.”

The note was delivered to the plaintiffs, and the answer assumed that they were the payees. The plaintiffs’ counsel certainly so regarded it, as he offered no proof of partnership or of ownership. The case comes directly within the rule laid down in *Millerd et al agt. Thorn* (56 N. Y., 402), in which the plaintiffs’ complaint alleged, in substance, that they were partners, and that they sold and delivered to defendant certain goods. The defendant denied the allegation of partnership, but admitted that the defendants purchased of the plaintiffs the goods set forth in the complaint. The answer then set up an affirmative defense.

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The court of appeals held that the denial of plaintiffs' partnership was immaterial, and that if the affirmative defense failed they were entitled to judgment whether partners or not; that the defendant had the affirmative and the right to open and close the proof, the denial of which was error. It was error in the present instance, for which the judgment must be reversed and a new trial ordered, with costs to abide the event.

SHEA, C. J., and NEHRBAS, J., concurred.

SUPREME COURT.

In the Matter of SARAH MOSES and BETSY MOSES.

New York (city of) — Children as vagrants — Habeas corpus — Its purpose not to review trials before a magistrate on question of vagrancy — Penal Code, section 291 — Code of Criminal Procedure, section 887.

Where warrants were granted by a police justice committing two children under fourteen years old as being vagrants, namely, "engaged in the occupation of begging under the pretext of peddling, to wit, Bowery, in said city, at ten forty-five P. M. on the 5th day of April, 1883, and frequenting the company of prostitutes, concert saloons, dance-houses and places of entertainment where spirituous liquors were sold," upon an affidavit made at the hearing before the magistrate stating the ages of the children, respectively, eleven and thirteen, and that they were found by the affiant committing acts of alleged vagrancy, described substantially in the same language as that used in the warrants, and the children were afterwards discharged upon *habeas corpus* :

Held, that the return of the commitment in answer to the *habeas corpus*, and the admission of the facts it contained by the failure to take issue thereon, presented a case, under section 291 of the Penal Code, upon which the court should have remanded the children.

The purpose of the writ of *habeas corpus* is not to review trials before a magistrate on questions of vagrancy.

First Department, General Term, October, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from order of special term in proceeding for *habeas corpus*.

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David Levy, for respondent.

John McKeon, district attorney; *Robinson, Scribner & Bright*, attorneys for Society for Reformation of Juvenile Delinquents, appellants.

John B. Pine, attorney for Society for Prevention of Cruelty to Children.

Elbridge T. Gerry, of counsel for appellants.

PER CURIAM.—Section 291 of the Penal Code declares under what circumstances children shall be regarded as vagrants, and, amongst other things, it provides that a female child under the age of fourteen years who is found begging, or receiving or soliciting alms in any manner, or under any pretense frequenting the company of prostitutes, “must be arrested and brought before the proper court or magistrate as a vagrant, disorderly or destitute child.” It also declares that such court or magistrate may commit the child to any charitable, reformatory or other institution authorized by law to receive and take charge of minors, or make such disposition of the child as is now, or may hereafter be, authorized in the case of vagrants, truants, paupers or disorderly persons.

Section 887 of the Code of Criminal Procedure, in defining who are vagrants, provides that any child between the ages of five and fourteen, having insufficient bodily health and mental capacity to attend public schools, found wandering in the streets of any city or incorporated village a truant without any lawful occupation, shall be deemed a vagrant.

The children in the case before us were arrested as vagrants and taken before one of the police justices of the city, and by him committed to the House of Refuge, which is in the care of the Society for the Reformation of Juvenile Delinquents. The warrants of commitment recite in substance that these children, being under the age of fourteen years, were charged on the oath of George H. Young with being vagrants, namely,

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“engaged in the occupation of begging under the pretext of peddling, to wit, Bowery, of said city, at ten forty-five o’clock P. M., on the 5th of April, 1883, and frequenting the company of prostitutes, concert saloons, dance houses and places of entertainment where spirituous liquors were sold.” It further recited that the magistrate caused the children to be brought before him for examination on the charge, and proceeded to inquire into the matter in their presence, and having read the proofs and allegations submitted to him and duly considered said matter, the child named in each one respectively was duly “convicted on the competent testimony of George H. Young of being such vagrants,” and was adjudged by the magistrate to be a proper object to be committed to the house of refuge.

By *certiorari* in the proceedings, addressed to the police justice, the clerk returned to the court the affidavit of George H. Young, and certified that that comprised all the record of the case then on file in that court. This affidavit, which was sworn to before the police justice who convicted the children of vagrancy, states their ages to be respectively eleven and thirteen years, and that they were found by him doing the acts of alleged vagrancy, which are described substantially in the same language as that used in the warrants. It is apparent on the face of the affidavit that it was made at the hearing before the magistrate.

The learned judge in the court below fell into the error of supposing that the children had been arrested under the provisions of section 887 of the Code of Criminal Procedure, and he held that the offense was not properly charged to bring them within that section, because it was not alleged that they were found wandering and begging in the streets. But it is obvious that the complaint was made under section 291 of the Penal Code already referred to, under which it is not necessary to show that the children were found wandering in the streets. The act of begging or receiving or soliciting alms makes children under the ages named in the section

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vagrants, and so when found frequenting the company of reputed thieves or prostitutes. Those offenses are sufficiently charged both in the affidavit and in the warrant of commitment. If it were necessary to recite the particular act of vagrancy, which was held not to be the case in *Gray's case* (11 *Abb.*, 56), where it is said that the words defining the particular acts of vagrancy may be regarded as surplusage, yet in this case the acts are specifically and sufficiently well defined. The word "Bowery," as used, is a sufficient indication of the place where the alleged offense was committed; the omission of the words "in the" can have no effect upon its validity.

The return of the commitment in answer to the *habeas corpus*, and the admission of the facts it contains by the failure to take issue thereon, presented a case upon which, we think, the court should have remanded the children. For that purpose the commitments should be regarded as final judgments under the provisions of the *habeas corpus* act, and, being *prima facie* valid, the jurisdiction of the magistrate making the commitment is the only question presented to the justice at special term for review. But, assuming that the court had authority to go behind the commitments, regular on their face and showing such fact as gave the magistrates jurisdiction, nothing was brought up by the writ of *certiorari* that would justify interference with the conviction. The clerk of the court returned the only record of the case then on file in that court. The testimony on which the conviction was had may well have been taken orally by the court, and it must be assumed that it was sufficient to justify the commitment where the question arises in the present form. The purpose of the writ of *habeas corpus* is not to review trials before a magistrate on questions of that character. Where that is the intention, other process is provided by law, under which an appellate court may pass upon the sufficiency of the evidence before the magistrate and the correctness of his decisions.

It is the duty of the magistrate to observe with great care

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the provisions of the several statutes in such cases, and to see that their records are properly made, and the certificate of conviction duly filed, and that their warrants of commitment are in due form. Section 4 of chapter 359 of the Laws of 1873, which relates to commitments to the house of refuge, provides in very general terms a remedy for the failure to file certificates, and for any irregularities, misdescriptions, defects or imperfections in the proceedings where persons are committed to the house of refuge; and this section would require, if there were any defect or imperfection in matters of form, that it be corrected by order of the court before which the writ of *habeas corpus* was returnable.

The order of the court below should be reversed, and the writ discharged, and the children remanded.

N. Y. COMMON PLEAS.

JAMES MCGIVERN, plaintiff and respondent, agt. THOMAS FLEMING, defendant and appellant.

Contract — Memorandum of, not valid unless name of party to be charged is signed below or at the end of memorandum.

A note or memorandum of contract for the sale of chattels is not valid unless the name of the party to be charged is signed below or at the end of the memorandum. And it is error to hold that if the name of the party to be charged can be found on the paper, he has subscribed all that part of the agreement that precedes his signature.

General Term, January, 1884. —

Before VAN HOOSEN, VAN BRUNT and J. F. DALY, JJ.

THE claim of the plaintiff was based upon an order alleged to have been given by the defendant for foliage, plants, &c. The plaintiff claimed that the order was signed by the wife of the defendant as agent. At the trial the signing of the order and all the material facts necessary to prove the plaintiff's case were denied by the defendant's wife, his daughter

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and himself. The plaintiff was his own sole witness. The jury rendered a verdict for the plaintiff for the full amount claimed with interest. From the judgment entered thereon the defendant appealed to the general term of the city, then marine court, and inasmuch as the alleged signature of the defendant, through his agent, was in the center, or near the center, of the alleged memorandum of order the general term of the marine court affirmed the judgment of the trial term as to that portion of the alleged order which appeared above the alleged signature of the defendant. From this judgment of the general term of the marine court reducing the judgment for the plaintiff to the extent of the items contained below the alleged signature, and affirming as to the residue, the defendant appealed.

Walter R. Leggatt, for defendant and appellant; *F. C. Devlin* and *R. Floyd Clark*, of counsel.

Moore, Low & Sanford, for plaintiff and respondent; *Mr. Moore*, of counsel.

VAN HOESEN, *J.* — The memorandum is not subscribed by the party to be charged. His signature, or rather a signature which the verdict of the jury compels us to regard as having been made by his authority, appears not at the end of the memorandum, but near the middle of it.

The jury found a verdict for the plaintiff for the price of all the goods mentioned in the memorandum, but the general term of the city court modified the judgment by deducting the price of those goods that "appear on the memorandum after the subscription of the defendant."

From this judgment of the general term of the city court it is obvious that in the opinion of that court, if a note or memorandum of a contract for the sale of personal property be signed not at the end, but in the midst of the list of the articles sold, the contract may be split into pieces, and the fragment that precedes the signing will be valid, whilst the

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fragment that follows the signing will be void. I am not aware of any decision that warrants such a construction of the statute. Since the case of *Davis* agt. *Shields* (26 *Wend.*, 341), it has always been understood that a note or memorandum of a contract for the sale of chattels is not valid unless the name of the party to be charged is signed below or at the end of the memorandum. The case of *James* agt. *Patten* (6 *N. Y.*, 9), also holds that the signature must be underneath or at the end of the memorandum. The memorandum is but one instrument, and must be either entirely valid or totally invalid. If the memorandum be not signed at the end, it is not such a note of the contract as the statute requires, and the contract is utterly invalid.

The courts have no right to circumvent the statute by holding that if the name of the party to be charged can be found on the paper, he has subscribed all that part of the agreement that precedes his signature. He has not subscribed the note or memorandum, and that he must do in order to bind himself.

The judgment and the order appealed from should be reversed and a new trial ordered, with costs to abide the event.

VAN BRUNT and J. F. DALY, JJ., concur.

CITY COURT OF NEW YORK.

ENRIQUE VALIENTE *et al.*, plaintiffs and respondents, agt.
JAMES BRYAN, defendant and appellant.

Juror—Misconduct of—When silence of counsel and defendant fatal.

If a party is cognizant of the misconduct of a juror, and does not call attention to it the first opportunity, he waives the objection. He cannot keep the objection in silent reserve and spring it upon his adversary afterwards by motion or upon appeal.

General Term, November, 1883.

Before McADAM and NEHRBAS, JJ.

Valiente *et al.* agt. Bryan.

APPEAL from order denying motion for new trial.

W. H. Newman, for appellant.

J. A. Murray, for respondent.

McADAM, *J.* — The defendant moved for a new trial on the ground of irregularity and misconduct on the part of the jury. The specific charge is that "after the plaintiff left the witness stand, and as he was passing the jury box, the ninth juror stopped the plaintiff and asked him some questions, and that the plaintiff showed the jurymen a paper containing the advertisement which was the subject-matter of the action." The defendant's attorney swears that he witnessed the occurrence mentioned, and that the time occupied was about two minutes, and that thinking the matter of no consequence he let it pass without calling the attention of the court to it. The case was thereafter summed up by counsel and submitted to the jury. The misconduct charged should have been called to the attention of the court at the time. It was known to the defendant and his attorney, and they were bound to complain of it then and there, and their right to raise the objection was waived. Instead of objecting, as he should have done, the defendant, with knowledge of the irregularity, allowed the jury to leave the box and retire for deliberation; and having knowingly taken the chances of a favorable verdict, he cannot now complain that he miscalculated the result.

The rule is inflexible, that where a party has his day in court, with every opportunity to object, and he does not see fit to avail himself of the right at the time it arises, the objection is waived, and it cannot be afterwards raised upon motion or by appeal. He cannot keep the objection in silent reserve and spring it upon his adversary in case he is unsuccessful in inducing the jury to accept his theory of the case. Good faith to the court and a proper respect for the orderly administration of justice require that misconduct on the part

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of jurors be called to the attention of the court at the first opportunity, in order that the abuse may be summarily rebuked, corrected and, if necessary, punished. The defendant having waived his right to object, it follows that the judge below was right in refusing to disturb the verdict upon the ground specified, and that his order must be affirmed, with costs.

NEHRBAS, J., concurs.

SUPREME COURT.

DANIEL E. SICKLES, respondent, agt. THE MANHATTAN GAS-LIGHT COMPANY, appellant.

Gas companies — When injunction to restrain company from removing meter for non-payment of bill will be granted.

When a dispute arises between a gas company and a consumer, the latter is entitled to have his rights investigated by the courts, and in such case an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried (*Affirming S. C.*, 64 How., 33).

First Department, General Term, October, 1882.

APPEAL from an order of the special term denying defendant's motion to dissolve a temporary injunction and continuing the same during the pendency of the action.

H. H. Anderson, for appellant.

John Graham, for respondent.

DWIGHT, J. — I think this order should be affirmed on the grounds and for the reasons so well stated in the opinion of the learned judge at special term. That statement, I think, fully justifies the exercise of the discretion of the court to con-

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tinue the injunction till the trial of the issue of fact joined in the action. It may, however, be added to the very impartial statement of facts contained in the opinion below that the proof of an overcharge for gas is not confined, as urged by counsel for the appellant, to inference from a comparison of the amounts charged to the plaintiff during different periods of his occupancy of the apartments; on the contrary, the affidavit of Sweeney, on the part of the defendants, shows that the plaintiff was charged with 100 feet of gas as registered by the meter between March seventeenth and April eighteenth a portion of the time covered by the plaintiff's absence from the country, and during which period, as the undisputed evidence shows, the apartments were closed and the gas was turned off between the meter and the main. Whether this registering was due to a fault in the meter, to an imperfection in the cut-off or to surreptitious use of gas by some person in the absence of the plaintiff, or whether the indication of the meter was erroneously read or recorded by the "indexer" may be the subject of inquiry on the trial of the action. The amount of the overcharge is very small, but since the defendants' right to cut off the plaintiff's gas is given by statute, and depends upon the sole condition of the plaintiff's refusal to pay for gas actually consumed, the amount of the overcharge, if one be clearly established, is immaterial to the inquiry.

I am in favor of affirming the order upon the opinion of justice LAWRENCE at special term.

DAVIS, P. J., and BRADY, J., concur.

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SUPREME COURT.

JOHN A. HUSSON, appellant, agt. WILLIAM GEORGE OPPENHEIMER, respondent.

Contract—Modification of—When need not be signed by both parties—When contingent interest in contract, parted with by modification—When right of action accrues.

Plaintiff had a contract to purchase lands of one S., dated January 27, 1883. The deed was to be taken in ninety days. Plaintiff assigned the contract to defendant on the 28th of January, 1882. The assignment was contained in two papers. One absolutely conveyed the contract to purchase for fifty dollars to the defendant and was executed by plaintiff only, and the other was an agreement between the parties that defendant should pay plaintiff \$450 cash or one-third of the profits of the purchase, the option to be exercised by defendant within the time during which he could take the deed. On February 10, 1883, there was indorsed on the contract, in reference to the payment of the \$450, or a share of the profits, these words: "In consideration of the sum of fifteen dollars to me in hand paid, I hereby agree to modify and change the foregoing contract by accepting in full payment and satisfaction thereof the sum of \$425, signed John A. Husson." The only difference between the parties was, the plaintiff claimed the right to the \$425 to be absolute and unconditional, the defendant claiming that it was dependent upon the plaintiff taking the deed which he never did. There was no dispute about the agreement but only as to its effect:

Held, that the plaintiff is entitled to recover under either paper. The defendant was bound to take a deed within the time limited. If he took no deed (which is admitted) he was bound to pay \$450 at the end of ninety days from the date of the Smith contract. The abandonment of performance by him was a legal option to pay the money price. The claim is limited to the amount called for by the modification, and was payable at once in the place of the original option.

Second Department, General Term, September, 1883.

Before BARNARD, P. J., DYKMAN and PRATT, JJ.

APPEAL from a judgment entered on the decision of Mr. justice PRATT, rendered on a trial had by and before him, without a jury, at the January circuit for 1883, held in and

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for the county of Kings, dismissing the complaint on the merits, with costs, and an extra allowance of five per cent to the defendant on plaintiff's claim. The facts are as follows :

The plaintiff made a contract in writing with one John Smith, dated January 27, 1882, by the conditions of which Smith agreed to convey to plaintiff by warranty deed certain lands and premises lying in the city of Brooklyn and therein described within ninety days from its date on payment of the purchase-price, viz. : \$5,000. On January 28, 1882, the plaintiff entered into an agreement with defendant to assign to him the Smith contract. The assignment was contained in two papers. One conveyed the contract absolutely and unconditionally for fifty dollars, and was signed by plaintiff only, and the other was an agreement between the parties, plaintiff and defendant, that defendant should pay plaintiff \$450 cash, or one-third of the profits of the purchase, the option to be exercised by defendant during the time in which he could take a deed of the premises. Thereafter, and on February 10, 1883, by an agreement with the defendant the following indorsement was made, and said contract so made with defendant : " In consideration of (\$15) fifteen dollars to me in hand paid I hereby agree to modify and change the foregoing contract by accepting in full payment and satisfaction thereof the sum of \$425." This indorsement was signed by the plaintiff and not by the defendant. The defendant refused to perform the terms of the Smith contract and never took title of the property thereunder, but forfeited the same. He also refused to pay the \$425 in pursuance of the modified contract of February 10, 1882, or any part of it. This action was brought to enforce the terms of the modified contract, and to recover from the defendant the \$425. The trial judge, justice PRATT, adjudged that the plaintiff could not recover, and held as matter of law, among other things : 1st. That the assignment of the Smith contract was absolute in consideration of fifty dollars, and that the modification of the agreement to pay plaintiff \$425 was not binding or obligatory on the defendant,

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because not signed by him. 2d. That the defendant, not having obtained a deed of the premises conveyed, or to be conveyed in and by the said Smith contract, and not having sold the property, and six months not having elapsed since the time fixed for passing the title as provided in the contract with defendant of January 27, 1882, before bringing this action, that said action was premature. 3d. That the payment of the \$450, or one-third of the excess of \$5,000, the purchase-price under the Smith contract, was dependent upon a contingency in the sale of the premises by the defendant which never happened.

Anson B. Moore and *Andrew J. Moore*, for plaintiff and appellant:

I. Whatever contingent interest the plaintiff may have had in the John Smith contract, or in the avails thereof over and above the \$5,000 purchase-price, was parted with by him when he received the fifteen dollars and signed the modification paper of February 10, 1883. The amount of his recovery was limited by that modification to the sum of \$425 therein expressed, and he was entitled to be paid that sum at once. (a.) This modification of the contract was made for a valuable consideration paid by the defendant to the plaintiff when the same was signed by plaintiff, and it was binding upon and could be enforced by both parties. It was not necessary that defendant should sign it to make it valid. (b.) The defendant pays plaintiff fifteen dollars and he executes the modification and release of date February 10, 1883. The defendant has this modification or release endowed on the duplicate contract held by him, of date January 28, 1883. The defendant could sign the same at pleasure or not at all as he saw fit. Can it be seriously claimed or pretended, then, that the defendant, having paid a consideration for such a modification and release, and the same having been duly executed by plaintiff, and without fraud or collusion, that a court would not enforce it? Did defendant make a contract and then pay the

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plaintiff for its modification, against his own interest? In view of such modification by the plaintiff, could he enforce a claim for profits derived from or through the Smith contract? If this action had been brought against the defendant for profits accruing to him in virtue of his contract of January 28, 1883, derived by the defendant through, by or under the Smith contract, could not defendant successfully interpose the plaintiff's modification or release of February 10, 1882, as a bar to such claim? Most assuredly he could, and most assuredly would the court enforce it. (c.) As a logical sequence, it follows that the finding and conclusion of the learned judge, "that the plaintiff, but not the defendant, made the agreement for the modification of the contract of January 28, 1882," is quite illogical and untenable. It is submitted that such finding is a legal anomaly, and without precedent or authority in this or any other civilized country. How the plaintiff could make an agreement with the defendant, and the defendant not make the same agreement with the plaintiff, it is difficult to see. To be an agreement there must be or exist a mutuality between the contracting parties. Could the plaintiff make an agreement with himself? To be an agreement, says Webster, there must be a union of minds, a compact, a bargain, a contract. An agreement, then, requires two or more persons. The judgment should be reversed for the reasons above stated. (d.) The defendant admits in his answer the modification of the contract by his assent and for a consideration. He only disagrees with plaintiff upon the construction.

II. It is a conceded fact in this case that the defendant failed to perform the contract assigned to him by the plaintiff, and made between plaintiff and John Smith; that defendant, by his own neglect and refusal to perform the terms of the Smith contract, and without any fault of the plaintiff, lost title of the property, and placed it wholly out of his power to take title within six months, or to get title at all under and in pursuance of the terms of said contract. 1. The defend-

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ant having placed it out of the power of plaintiff to perform the Smith contract, and having the sole and exclusive right to perform it himself, and having wholly neglected and refused to perform it, he cannot interpose his own wrong in that behalf, in avoidance of his contract of January 28, 1882, and its modification on February tenth, thereafter, and thereby cheat and defraud the plaintiff out of his rights. In justice and equity he should pay to the plaintiff the \$425. 2. When the defendant placed it out of his power to perform the terms of the Smith contract, and take title to the property, the plaintiff's right of action against defendant on the contract to pay him \$450, or one-third of the proceeds in excess of the purchase-price, was absolute, perfect and complete. In no event and under no circumstances did the law require him to wait longer; his right of action was as perfect then as it could ever be. It would be a mere idle ceremony to wait for the fulfillment of a contract by the defendant, which could under no possible circumstances be fulfilled. By the terms of the contract, made with the defendant of date January 28, 1882, as interpreted by the court in his decision, plaintiff must wait "six months from the time of receiving the deed of said Smith," before his right of action would accrue; but as the defendant refused to perform the contract, and never took a deed of the property from Smith, it is quite clear from the reasoning of the learned judge that the plaintiff's right of action would never accrue either in time or eternity. It is submitted that when the defendant placed it out of his power to perform the terms of the Smith contract, plaintiff could maintain this action, and that his right of action was perfect and complete. This principle is well settled (*Willard's Equity Jurisprudence*, 297; 1 *Maddock's Ch. Pr.*, 331; *North, as Exr. &c.*, agt. *Pepper*, 21 *Wend.*, 636; *Carpenter* agt. *Brown*, 6 *Barb.*, 151; *Bellinger* agt. *Kitts*, 6 *Barb.*, 281; 1 *Chitty*, 318; 5 *Cow.*, 506; 1 *Fonb. Eq.*, B. 1, ch. 6, *see* 3). Where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat

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the contract as rescinded (2 *Parsons on Con.*, 191 and note; see, also, *Planche* agt. *Colburn*, 8 *Bingham*, 14; *Shaw* agt. *Turnpike Co.*, 2 *Penn.*, 454; 2 *Penn.*, 445; *Warden of the Church of St. Louis* agt. *Korwan*, 9 *Louisa. Ann. Rep.*, 31; *Dubois* agt. *Delaware Canal Co.*, 4 *Wend.*, 285; *O'Rourke* agt. *Percival*, 2 *Ball & Beatty*, 64; *Hammond's Digest*, sec. 20, p. 239; *Freer* agt. *Denton*, 61 *N. Y.*, 492; *Burtis* agt. *Thompson*, 42 *id.*, 246). When one party unqualifiedly refuses to do the work he has agreed to perform, the other party is not bound to wait until the time for the performance of the work has expired, but may treat the contract as broken and recover damages accordingly (*Thompson* agt. *Lang*, 8 *Bosw.*, 482; see, also, *Niblo* agt. *Binsse*, 44 *Barb.*, 54; *Lorillard* agt. *Silver*, 35 *Barb.*, 132; *Rev.*, 36 *N. Y.*, 578). When defendant puts it out of his power to perform, right of action accrues (*Crist* agt. *Amour*, 34 *Barb.*, 378; *Scrim* agt. *Tinker*, 34 *Barb.*, 333; *Marrange* agt. *Morris*, 34 *How.*, 178; *Clarke* agt. *Crandell*, 27 *Barb.*, 73; *McNitt* agt. *Clark*, 7 *Johns.*, 465; *Belshow* agt. *Colie*, 1 *E. D. Smith*, 213).

William G. Oppenheim, defendant and attorney in person.

Charles E. Chare and *H. J. Morris*, of counsel for respondent:

I. The plaintiff was paid the full consideration for the assignment of the Smith contract — fifty dollars — and there is nothing due or claimed by him under that instrument.

II. The defendant's promise, in the agreement of date January 28, 1882, to pay \$450 was dependent upon a contingency which has never happened; nothing has ever become due under it, or can become due until the happening of the contingency, *i. e.*, the securing of the deed and sale of the property.

III. The plaintiff relies upon the memorandum to establish a modification of the agreement and an absolute promise by the defendant to pay \$425. It is signed by the plaintiff alone. Evidence of acts and conversations between the parties to show a modification and absolute promise by the

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defendant was not offered by plaintiff, and the court therefore properly treated this memorandum as an option — an offer or agreement by plaintiff to accept \$425. Read in connection with the agreement to which it refers, its clear and unmistakable meaning is, that plaintiff agrees to accept \$425, instead of \$450, when the latter sum becomes due. It substitutes \$425 for \$450 in the agreement. The case does not disclose any testimony that shows that defendant agreed to pay \$450, or \$425, except as provided by the agreement, and does not show that he waived or agreed to waive his option to give plaintiff one-third the amount realized on the sale over and above the sum of \$5,000. The plaintiff has failed to prove that defendant received the deed of the premises to be conveyed in and by the terms of the Smith contract, or any modification of his contract of January 28, 1882, and has failed to prove any cause of action. The understanding should have been proved by acts of the parties, including what was said between them. The mere impression or understanding of one of the parties can never justify the inference that the understanding of the other was the same (*Murray agt. Bethune*, 1 *Wend.*, 191 [196]; *Crounse agt. Fitch*, 14 *Abb. Pr.*, 346 [350]; *Gutchess agt. Gutchess*, 66 *Barb.*, 483 [486]; *Rich agt. Jackway*, 18 *Barb.*, 357 [359]; *Ehle agt. The Chittenango Bank*, 24 *N. Y.*, 548).

BARNARD, *P. J.*—The court erred in its findings that the modification of the contract was not agreed to by the defendant. The facts are briefly these: Plaintiff had a contract to purchase lands of one Smith, dated January 27, 1882. The deed was to be taken in ninety days; plaintiff assigned the contract to defendant on the 28th of January, 1882. The assignment was contained in two papers. One absolutely conveyed the contract to purchase for fifty dollars, to the defendant, and was executed by plaintiff only, and the other was an agreement between the parties that defendant should pay plaintiff \$450 cash, or one-third of the profits of the pur-

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chase, the option to be exercised by defendant within the time during which he could take the deed. On the 10th of February, 1883, there was indorsed on the contract in reference to the payment of the \$450, or a share of the profits, these words:

“In consideration of the sum of \$15 (fifteen dollars) to me in hand paid, I hereby agree to modify and change the foregoing contract by accepting in full payment and satisfaction thereof the sum of \$425.

JOHN A. HUDSON.”

Dated *February 10*, 1882.

The complaint avers this to have been a mutual agreement. The answer admits that in consideration of fifteen dollars paid plaintiff by defendant, the plaintiff agreed to modify the aforesaid contract by accepting \$425 instead of \$450. The only difference between the parties was this, the plaintiff claimed the right to the \$425 to be absolute and unconditional, and the defendant claiming that it was dependent upon the plaintiff taking the deed, which he never did. There was no dispute about the agreement, but only as to its effect. The plaintiff is entitled to recover under either paper. The defendant was bound to take a deed within the time limited. If he took no deed, which is admitted, he was bound to pay \$450 at the end of ninety days from the date of the Smith contract. The abandonment of performance by him was a legal option to pay the money price. The modification of the contract having been admittedly made by both parties, and for a good consideration, limits the claim to the amount called for by this modification paper. If the question was material, it seems quite clear that the modification was designed to put a fixed money price at all hazards, payable, and at once, in the place of the original option.

As we have observed, that option had been already made. The judgment should be reversed and a new trial granted, costs to abide event.

DYKMAN, J., concurs.

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SUPREME COURT.

DANIEL E. SICKLES agt. THE MANHATTAN GAS-LIGHT
COMPANY.

Gas companies — Injunction — Company's meter not to be regarded as conclusive as to the quantity of gas consumed and charged for — Right of consumer to an injunction in the case of disputed charge.

A gas company's meter, even after being tested and inspected according to law, is not to be regarded as the absolute test of the quantity of gas consumed and charged for, but may be contested by other reliable testimony.

When a dispute arises between the company and a consumer, the latter is entitled to an injunction to prevent the cutting off of the supply of gas until the cause can be tried.

Special Term, January, 1884.

TRIAL of issues of fact.

John Graham, for plaintiff.

Henry H. Anderson, for defendant.

VAN VORST, J. — It is urged by the learned counsel for the defendant that the Laws of 1859 (*chap. 11*) provide for the appointment of a state inspector, by whom every gas meter, before it is used by the defendant, shall be tested and sealed, and that such meter is by the statute made the legal measure of gas, as between the consumer and the company, and that, as the same statute is careful to provide, that in case a consumer shall question the correctness of any meter, the company is required to test it, in the presence of the consumer, if required, and that if then dissatisfied with the test made by the company the consumer may have the meter re-inspected by the state inspector, it is evident that the statute intended that the registry of the meter should be the test of the amount consumed, and be the arbiter between the parties.

Strong as this position is, it has already been considered by

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this court, and the result reached is in substance adverse to the counsel's contention.

The meter and its registry has not been received, by this court, as conclusive of the correctness of the defendant's claim for gas consumed by the plaintiff. On the motion for the injunction in this case, to restrain the removal of the meter from the plaintiff's premises, and from cutting off the gas therefrom, heard before Mr. justice LAWRENCE, it distinctly appeared that the meter in question had been sealed by the state inspector as correct, pursuant to the Laws of 1859, as it did also that the defendants had provided and kept upon its premises a suitable apparatus, approved and sealed by the state inspector, for testing and proving the accuracy of gas meters, provided for use by the company, and that the meter, of which complaint is made, was on the 16th November, 1881, proved and tested, by means of the apparatus above mentioned, and that it was found to register four feet slow, and that with such exception, the meter was in good condition and working order. It also appeared by the affidavit of the secretary of the American Meter Company, who was familiar with the construction and operation of gas meters, that "it is impossible for the meter to register or indicate gas without gas passing through it." The president of the company who is acquainted with the construction and use of gas meters, also testified on that motion "that if gas is completely shut off from a meter, it is impossible for any registry to be made by the indices." The injunction to restrain the removal of the meter was allowed by the judge at special term, and the correctness of the decision has been affirmed at the general term. The grounds and the reasons stated in the opinion of the learned judge at special term, and which cover the case, were approved at the general term. The case made by the defendants on this trial is not essentially different from what it was, when before the special and general terms on the above occasions. The testimony of the expert witnesses, given upon this trial, as to the rigid accuracy of the gas meter in its

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registry of gas consumed, and as to the impossibility that gas should be indicated, unless it had actually passed through the meter, is only cumulative. The accuracy of the registry by the meter upon which the bills rendered by the defendants are exclusively based, is now questioned, as it was before, through evidence tending to show the amount of gas actually consumed, and how and under what regulations it was used by the plaintiff, as it is also, by evidence, that the meter registered a consumption of gas during a period when no gas passed through it.

It is with this latter subject that I will principally deal, as I conclude it to be decisive of this case. Upon the plaintiff's departure for Europe, on the 29th day of January, 1881, the gas was cut off by the janitor of the building, close to the meter, and it remained cut off until the sixth May following. That no gas actually passed the meter during that period is proved as satisfactorily as such fact could be. The janitor of the building, who performed both acts, has testified to these facts, as he has to the further fact that no gas was used on the premises during that period. And yet the servant of the company has registered 100 feet of gas as passing through the meter and consumed by the plaintiff between the 17th day of March and the 18th day of April, 1881.

A witness named Dunn was called on behalf of the defendant, who testified that he was upon the plaintiff's premises during every month of his absence therefrom and that he found gas burning there. If this witness testified truly, and it be claimed that the gas he saw burning passed through the meter that supplied the plaintiff's premises, then he proves too much for the soundness of the defendant's case. It is shown that the meter did not register gas during the month of February and up to the seventeenth day of March, whilst the non-registry during that period corroborates the testimony of the janitor. Notwithstanding the testimony of the witness Dunn, I find no difficulty in accepting the testimony of the janitor as strictly true and reliable.

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The general term, in referring to this particular subject, in its opinion, says: "The amount of the overcharge is very small, but since the defendant's right to cut off the gas is given by statute, and depends upon the sole condition of the plaintiff's refusal to pay for the gas actually consumed, the amount of the overcharge, if one be clearly established, is immaterial to the inquiry."

Whether this overcharge was the result of a defect in the meter or an error in the registry, can make no difference. The defendant claims it, and the plaintiff is aggrieved to that extent. There is another conceivable solution, and that is, that some person other than the janitor may have, without his knowledge, turned on the gas for a short time and then cut it off again. But of that there is no evidence, and the adoption of such a conclusion would be speculative or conjectural only. It is inconclusive in the face of the testimony of the janitor. As the gas was certainly turned off on the twentieth-ninth January, and there being no evidence that it was turned on again until the sixth May following, under the fact above referred to, the presumption would be that it was actually cut off during the whole interim. As to the correctness of the defendant's charges for gas, claimed to have been consumed by the plaintiff during the other months in controversy, it is not possible for me to determine accurately. If I should adopt the registry thereof claimed to have been taken by the defendant's servants, the items are severally correct.

The plaintiff has shown several absences from the city, covering a considerable portion of the period embraced by these items, during which gas was not consumed in a portion of his premises, which by comparison, month with month, and otherwise, as is urged, show that no such amount of gas as is charged for was in fact consumed. Any attempt to adjust the matter outside of adopting the returns of gas registered by the meter, would be largely speculative and unsatisfactory under the evidence, and yet a cloud is cast upon these returns by the charge made for the 100 feet of gas which was

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not consumed. As it is, under the facts with respect to that 100 feet of gas charged for, and the law as already established for this case, there must be judgment for the plaintiff, restraining the defendant from removing the meter, leaving to the defendant the right to establish its claim for gas actually consumed, by an appropriate action at law, if the parties cannot themselves adjust it without recourse to legal measures.

SUPREME COURT.

DIEDERICH FINCKE agt. THE POLICE COMMISSIONERS.

Excise law — Liquor license — Section 4, chapter 549 of 1873 — Effect of conviction of an employe of a violation of the statute — Injunction does not lie to restrain an illegal arrest.

An injunction does not lie to restrain an illegal arrest, for the reason that if a party is illegally arrested he has a prompt and efficacious relief by *habeas corpus*, and also for the wrong he may sustain by an action for damages.

The plaintiff is a keeper of a tavern in the city of New York, at No. 620 Grand street. The commissioners of excise, on the 30th of April, 1883, granted him a license to commence on that date and to terminate on the 1st of May, 1884, to sell strong and spirituous liquors, wines, ale and beer, in quantities of less than five gallons, for which he paid the fee prescribed by law. F., a barkeeper of plaintiff, was convicted of keeping open said place unlawfully on Sunday, May 13, 1883.

Is a license forfeited by the conviction of an employe of the licensee, of a violation of the statute? Did such conviction of an employe of the licensee, of a violation of the statute (*sec. 4, chap. 549 of Laws of 1873*) forfeit his license, *quære*.

The temporary injunction granted enjoined and restrained the police commissioners and their officers from closing up the business of a tavern carried on by plaintiff at 620 Grand street, and from preventing the plaintiff or his employes from selling strong and spirituous liquors, wines, ales and beer, in quantities less than five gallons, at said tavern, except on Sundays or election days, or any days between the hours of one and five o'clock in the morning, and from arresting said plaintiff or his employes by reason of their carrying on the business of keeping

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said tavern, or selling said wines, liquors, &c., until the further order of the court.

Held, that so far as the injunction relates to the arrest of the plaintiff or his employes, he has a perfectly adequate remedy at law for any injury which he may sustain by reason of the alleged unlawful action of the defendants, and the injunction cannot be continued.

It seems doubtful, even in case of the defendants threatening to close up the plaintiff's place of business, that he would be entitled to an injunction, because he has an adequate remedy at law against the defendants if they act illegally in closing such place of business by an action for damages.

At Chambers, January, 1884.

THIS is a motion to continue a temporary injunction restraining interference with plaintiff's business as a licensed liquor dealer.

Platt & Bowers, for plaintiff.

D. J. Dean, assistant corporation counsel, for defendants.

LAWRENCE, *J.*—The complaint, which is positively verified and used as an affidavit on this motion, alleges in substance that the plaintiff is a resident of this state, and has for many years carried on business as a keeper of a tavern in the city of New York, at No. 620 Grand street. That he is, and at all times has been, a person of good moral character, and has been, and still is, possessed of sufficient ability to keep such tavern, and the necessary accommodation to entertain travelers; and that such tavern is required for the actual accommodation of travelers at the place where plaintiff carries on his business. That in order, conveniently and properly, to carry on said business, it is necessary that strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time, should be sold. That on the 30th of April, 1883, he applied to the board of commissioners of excise for the city and county of New York for a license authorizing him to sell and dispose of strong and spirituous liquors, wines, ales and beer, in quantities less than five gallons, at

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the aforesaid tavern. That the commissioners being satisfied that the plaintiff was a person of good moral character, and had sufficient ability to keep a tavern and the necessary accommodations to entertain travelers, and that a tavern was required for the actual accommodation of travelers at said place, and on said 30th day of April, 1883, issued and granted to him a license, to commence on said date and to terminate on the 1st of May, 1884, to sell strong and spirituous liquors, wines, ales and beer in quantities of less than five gallons. That plaintiff paid for said license the fee prescribed by law, to wit, the sum of seventy-five dollars, at the time of the granting of the same. That since said time he has carried on his aforesaid business in a lawful and proper manner, and that such license remains in full force and unrevoked. That the defendants French, Mason, Mathews and Nichols are police commissioners of the city of New York, and constitute the head of the department of police in said city. That the defendant Leary is a captain in said department, and is in charge of the Thirteenth precinct, within the territorial limits of which the aforesaid premises are located. That the defendants, combining and confederating together to injure this plaintiff, and without lawful cause or authority, have threatened and still do threaten to close up his aforesaid place of business, and to arrest any and all persons, including this plaintiff, who may be found in charge thereof and engaged in the lawful business of keeping the aforesaid tavern, and selling strong and spirituous liquors, &c., and have on two or three occasions within the last two days arrested and caused to be imprisoned certain of the plaintiff's employes who were engaged in their aforesaid lawful business. That plaintiff has no adequate means of redress for the injuries so threatened him except by the interposition of the equitable powers of this court, and that he has no sufficient remedy at law for the damages he may sustain. Wherefore he prays that the defendants, each and every one of them, their agents, &c., and all persons acting under their authority, may be enjoined

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and restrained from interfering with him in the conduct of his aforesaid business, or from closing up his said tavern, or from preventing him or those employed by him from selling at said tavern in the course of the said business there conducted, strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time, until the 1st day of May, 1884. On the return of the order to show cause, which was issued herein, the defendants read in opposition the affidavit of the defendant Leary, which stated that he is the captain of the Thirteenth police precinct of the city of New York. That John Freese, then a barkeeper employed by the said Diederich Fincke, the plaintiff in this action, was heretofore, on the 24th day of May, 1883, convicted in the court of special sessions of the peace of the city of New York, of keeping open a place where intoxicating liquors were sold, at 620 Grand street in the city of New York, the tavern or hotel of the plaintiff, unlawfully, on Sunday, May 13th, 1883. That annexed to said affidavit is a certified copy of said judgment, and that the license of said plaintiff to sell spirituous liquors referred to in the complaint was thereby forfeited and annulled.

Upon turning to the record of conviction annexed to said affidavit, it appears that the record states that Freese was convicted, "on confession, of the misdemeanor of unlawfully keeping open a place where intoxicating liquors were sold, on Sunday the 13th day of May, 1883, and committed in said city of New York on the 13th day of May, 1883, and after having duly elected to be tried by said court, and having been duly arraigned and charged upon the said misdemeanor, and having duly answered the same, it was thereupon ordered and adjudged by the court that the said John Freese, for the misdemeanor aforesaid, whereof he is convicted, pay a fine of ten dollars; and it is ordered that he stand committed to the custody of the keeper of the city prison of the city of New York until the said fine be paid, but not exceeding ten days.

It will be observed that the record of conviction does not

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state that Freese was convicted of selling liquors on Sunday, and of keeping open on Sunday the place of the plaintiff at 620 Grand street. That fact only appears from the affidavit of the defendant Leary, the police captain. The plaintiff, in his answering affidavit, alleges that in pursuance of section 4 of chapter 549 of the Laws of 1873, he was summoned by the board of excise of the city of New York to answer to the charge that the said John Freese, while in the deponent's employment, had been guilty of any violation of the excise law, or that there had been any such violation at deponent's tavern, 620 Grand street. That he attended before said board and that a full investigation of the matter was had, and that the board exonerated him from any violation on his part, or at his tavern, 620 Grand street, of any of the provisions of the excise law, and refused to annul his aforesaid license, and he alleges also that if Freese at any time violated the provisions of the excise law it was without deponent's personal presence. That he has never intended to violate in any manner the provisions of the said law, but has for fifteen years last past lawfully conducted his business of the keeping of a hotel at said place, and desires to be allowed to continue to do so. That the aforesaid place is an actual tavern. That he has a large number of rooms which are subject to the demands of any travelers who may there apply for board or lodging, and that he keeps a register, and that his bar is kept in connection with the said hotel and restaurant. Deponent further says that various police officers of this city, acting under the instructions of the defendant James Leary, have, on several occasions during the past week, called at his place of business and in distinct words ordered and directed the closing thereof, and have told deponent that he must close his place, and to threaten that if either he or his employes did not close such place they would arrest and remove them. That they did not make or threaten to make such arrests by reason of any charge that any crime or wrong had been committed, but they simply used that as a means to enable them to compel the closing of

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the deponent's said place of business. That the deponent is willing to execute bonds in any amount that may be considered reasonable and proper for the further maintenance of the injunction pending the trial of this action.

Section 5 of chapter 549 of the Laws of 1873, entitled "An act to amend an act entitled an act regulating the sale of intoxicating liquors, passed April 11, 1870, and the act entitled an act to suppress intemperance and to regulate the sale of intoxicating liquors, passed April 16, 1857," provides, "section 21 of the act entitled an act to suppress intemperance and to regulate the sale of intoxicating liquors, passed April 15, 1857, is hereby amended so as to read as follows :

"SECTION 21. No inn, tavern or hotel keeper, or other person shall sell or give away intoxicating liquors or wines on Sunday or upon any day on which a general or special election or town meeting shall be held, and within one-quarter of a mile from the place where such general or special election or town meeting shall be held, in any of the villages, cities or towns of this state to any person whatever as a beverage * * * Whoever shall offend against the provision of this section shall be guilty of a misdemeanor, and shall be punished for each offense by a fine not less than thirty dollars nor more than two hundred dollars, or by imprisonment not less than five days nor more than fifty days, or both such fine and imprisonment, at the discretion of the court."

Section 3 of said act of 1873, among other things, provides that "nothing herein contained shall be construed to prevent hotels from receiving and entertaining travelers at any time subject to the restrictions contained in this act, and the act hereby amended.

Section 4 of the act of 1873 provides as follows :

"Section 8 of said act is hereby amended so as to read as follows :

"SECTION 8. Any conviction for the violation of any provision of this act, or of the acts hereby amended, by any person or persons licensed, or at any place licensed, as herein

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provided, shall forfeit and annul such license. The board of excise of any city, town or village may at any time, and upon the complaint of any resident of said city, town or village, summon before them any person or persons licensed as aforesaid; and if they shall become satisfied that any such person or persons has or have violated any of the provisions of this act, or of the acts hereby amended, they shall revoke, cancel and annul the license of such person or persons, which they are hereby empowered to do, and, where necessary, to enter upon the premises and take possession of and cancel such license. Upon an inquiry, the said board, or the party complained of, may summon, and the said board may compel the attendance of witnesses before them and examine them under oath."

It is this section of the act of 1873 upon which the defendants rely for their position that the conviction of Freese, the defendant's barkeeper, *ipso facto*, forfeited and annulled the license of the plaintiff. The plaintiff also relies upon the proceedings which were had before the board of excise commissioners under this section as supporting his position that his license was not revoked by a conviction of Freese. The counsel to the corporation cites in his points the case of *The People* agt. *Tighe* (5 Hun, 25) as conclusive upon this question. It will be observed, however, that in that case the defendant, who held a license commonly called a storekeeper's license, which authorized him to sell strong and spirituous liquors in quantities less than five gallons at a time, not to be drank on his premises, for the term of one year, was convicted of the offense of selling strong and spirituous liquors, &c., in quantities of less than five gallons, to be drank in the house, shop or liquor store of the defendant; and it was insisted by the district attorney that by section 4 of chapter 549 of the Laws of 1873, before referred to, the license of the defendant which had been offered in evidence on the trial was by such conviction forfeited and annulled, and therefore that the sale admitted and proved was in viola-

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tion of the law. The counsel for the defendant insisted and contended that the conviction of the defendant in and of itself did not annul and forfeit the license, and that until the license was revoked by the judgment of some competent tribunal it was in full force and effect and justified the sales made by the defendant, as admitted and proved. But the court held that the conviction, *ipso facto*, by the express words of the statute of 1873, operated to revoke and annul his license, and that it did not any longer afford him any justification or protection.

In that case, the party who held the license had been tried and convicted of a violation of the excise law. The case is not, therefore, conclusive upon the point sought to be raised in this case, which is, that a license is forfeited by the conviction of an employe of the licensee, of a violation of the statute. The counsel to the corporation contends in this case that the statute is intended to effect the forfeiture and annulment of the license to sell liquor at the place named therein, in case of the conviction of any person for violating the excise law at the place licensed, on the ground that it is not only a license to a person permitting him to sell spirituous liquors at retail, but that it is also a license permitting spirituous liquors to be sold only at the one place named, and is therefore a permission to the person named to sell either in person or through employes, and he argues that when, therefore, it is provided by the statute of 1873 that any conviction for the violation of any provision of this act, &c., shall forfeit and annul such license, it is intended to provide that the conviction of the persons licensed for a violation of the excise law, or the conviction of any person violating the excise act at any place licensed, shall work the forfeiture of the license.

The case of *The People agt. Tighe*, before referred to, does not in terms go so far as to support this position. The defendant there had his day in court, and was defended by counsel. The plaintiff here, so far as the record discloses, was not

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present at the trial of Freese, took no part in the proceedings, and the conviction of Freese was upon his own confession. Furthermore, the record itself does not show, as I have before stated, that Freese was guilty of a violation of the excise law at No. 620 Grand street. That fact is only made out by the affidavit of the defendant Leary. Whether a judgment which is relied upon to revoke the license of one man, by reason of the conviction of another, of a violation of the excise law, can be supplemented in that manner, particularly where the person whose license is to be taken away was not heard upon the trial of the party convicted, is perhaps doubtful. But in the view which I take of this case, it is not necessary for the disposition of this motion to definitely decide that point.

The temporary injunction granted upon the issuing of the order to show cause enjoined and restrained the defendants from closing up the business of a tavern carried on by the plaintiff at 620 Grand street, and from preventing the plaintiff or his employes from selling strong and spirituous liquors, wines, ales and beer in quantities less than five gallons at said tavern, except on Sundays or election days, or on any days between the hours of one and five o'clock in the morning, and from arresting said plaintiff or his employes by reason of their carrying on the business of keeping said tavern or selling said wines, liquors, &c., until the further order of the court.

The counsel to the corporation states in his points, preliminary to the argument of the questions presented on the motion, that the defendants desire to disclaim the assertion of any right to close up the plaintiff's place of business, but that they do claim the right to arrest any person found selling spirituous liquors at the hotel upon the plaintiff's premises, upon the ground that no legal license exists authorizing such sale; and he therefore contends that so much of the injunction as forbids the defendants to prevent the plaintiff or his employes from selling spirituous liquors, and to arrest the plaintiff or his employes for selling spirituous liquors, should

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be vacated. It is perfectly well settled that an injunction does not lie merely to restrain an illegal arrest, for the reason that if a party is illegally arrested he has a prompt and efficacious relief by *habeas corpus*, and also for the wrong he may sustain by an action for damages (*See Birch agt. Kavanaugh*, 12 Abb. [N. S.], 410, 414, *decided by the general term of the third department*; *Murphy agt. Board of Police*, 63 How. Pr., 396).

Assuming then that the plaintiff's license to sell liquors at his hotel did not become forfeited and annulled by the conviction of the barkeeper of a violation of the excise law on the 13th of May, 1883, it would appear that the plaintiff has a perfectly adequate remedy at law for any injury which he may sustain by reason of the alleged unlawful action of the defendants. So far as the injunction relates to such arrests, it cannot be continued under the authorities before referred to, and as the defendants in open court have disclaimed the assertion of any right to close up the plaintiff's place of business, there seems to be no reason for enjoining them from doing that which they do not intend to do. I should very much doubt, however, that even in the latter case the plaintiff would be entitled to an injunction, because he has an adequate remedy at law against the defendants if they act illegally in closing his place of business by an action for damages, and there is nothing in the papers before me to show that the defendants are not responsible pecuniarily for any damages which the plaintiff may thereby sustain.

It is unnecessary for me to consider the effect of the proceedings before the board of excise, which are referred to in the plaintiff's moving papers, if I am correct in my understanding of the authorities before referred to.

The motion to continue the preliminary injunction must be denied, with costs.

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N. Y. COMMON PLEAS.

WILLIAM H. DEVINELLE, appellant, agt. ALBERT R. EDY,
respondent.

Statute of limitations—Code of Civil Procedure, section 381—Action for partnership accounting, where the articles are under seal, not barred till twenty years.

An action for a partnership accounting, where the articles are under seal, is not barred until twenty years.

Where the defendant, by the partnership agreement, agreed to pay one-half the losses and expenses and has failed to do so, and plaintiff, under his partnership liability to third persons, has paid the whole, the basis of an action by plaintiff to recover one-half the sums paid by him is the defendant's covenant to pay over half and its breach.

General Term, January, 1884.

IN April, 1869, the plaintiff and defendant formed a partnership by an agreement under seal. Among other provisions was the following: "All losses happening to the said firm * * * and all expenses of the business shall be borne by the said parties in equal proportions." The business proved unprofitable and was wound up in December, 1869. The plaintiff, on or before June, 1870, paid and expended moneys for said firm in its business. Before this action payment of one-half these disbursements was demanded by the plaintiff from defendant and was refused. The action was brought October 24, 1882. The complaint asked an accounting and judgment for one-half the sums paid by the plaintiff. The court below dismissed the bill, holding the claim barred by the statute of limitations. The plaintiff appealed from the decree to this court.

Childs & Hull, for appellant.

A. J. Vanderpoel and John M. Bowers, for respondent.

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BEACH, J.—The question raised by this appeal is whether or not the action is upon a sealed instrument, and so amenable to the twenty year limitation (*Code Civil Pro.*, sec. 381).

After extended examination I fail to see upon what the action is based, save the covenant to bear one-half the losses and pay a like proportion of the expenses. The defendant is alleged to have broken that covenant by not paying his quota, and, therefore, liable to the plaintiff who has paid his share, in addition to his own. The conclusion of the learned justice below that there was an absence of any covenant in the agreement whereby one partner was to pay the other for any amount paid in excess of one-half, and, therefore, the action was not brought upon the indenture, seems to me an over refined distinction.

The defendant certainly agreed to pay one-half the losses and expenses, has failed to do so, and plaintiff, under his partnership liability to third persons, has paid the whole. The basis of this action is assuredly the defendant's covenant to pay one-half and its breach. The illustration of co-obligors on a bond under seal where one pays the whole sum is not analogous. The right to contribution in such case results from a principle of equity jurisprudence, not contract express or implied (1 *Story's Eq. Jur.* [12th ed.], sec. 493; *Aspinwall agt. Sacchi*, 57 *N. Y.*, 331). If the bond contained a covenant between the co-obligors to pay one-half, or other proportion of the penalty, there would be no need to rely upon the equitable principle, and an action for contribution would necessarily be founded on the covenant.

The remarks of BUTLER, J., in *Foster agt. Allanson* (2 *T. R.*, 779), and in the note referring to *Moravia agt. Levy*, while not directly pertinent, give strength to these views. The parties were partners by indenture, and stated the accounts, including items not included in the partnership business. The defendant promised to pay the balance against him. The action was assumpsit, the learned judge saying in each case that the action would lie because of the promise, but without

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the promise the action would have been on the covenant (*Casey* agt. *Brush*, 2 *Caines*, 293).

The case of *Peters* agt. *Delaplaine* (49 *N. Y.*, 365) does not bear upon the point. The court there held an action for specific performance involved considerations for the court, outside the provisions of the contract, and no difference resulted from the contract being under seal or without. Facts disconnected with the instrument whereof performance is sought, such as laches, material change in the condition of the parties, and other surroundings, influenced the discretion of the court to grant or deny the relief, and therefore the action was not brought upon the contract.

The case of *Knox* agt. *Gye* (*L. R.*, 5 *House of Lords*, 656), and *Noyes* agt. *Crawley* (10 *Ch. Div.*, 31) depended upon the statute limiting an action of account to six years. There is no similar provision in our law.

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event.

SUPREME COURT.

In the Matter of the Application of FRAZER C. HALL for a peremptory *mandamus* against THE BOARD OF SUPERVISORS OF GREENE COUNTY.

Mandamus— Construction of statute — Meaning of the words “the highest” and “the next highest,” as used in chapter 215, Laws of 1870.

The statute, chapter 215 of Laws of 1870, entitled “An act to amend an act for the publication of the session laws by two newspapers in each county of the state,” declares that “the appointment shall be made in the following manner: Each member of the board of supervisors shall designate by ballot one newspaper printed in the county to publish the laws, and the paper having “the highest” number and the paper having “the next highest” number of votes, shall be the papers designated for printing the laws; provided such papers are of opposite politics

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and fairly represent the two principal political parties into which the people of the county are divided."

Held, that when three papers are voted for and the two claimed to have been selected received an equal number of votes, there has been no selection.

Held, further, that a *mandamus* should be granted to compel the board of supervisors of Greene county to designate two papers to publish the session laws.

Ulster Special Term, December, 1883.

APPLICATION for a peremptory *mandamus* to compel the board of supervisors of Greene county to designate two papers to publish the Session Laws.

J. A. Griswold, for motion.

E. A. Chase and *Mr. Werner*, opposed.

WESTBROOK, *J.* — This application presents questions of law only upon the following undisputed facts: The board of supervisors of the county of Greene, on the 24th day of December, 1883, pursuant to the provisions of chapter 215 of the Laws of 1870, entitled "An act to amend 'An act for the publication of the Session Laws by two newspapers in each county of this state,' passed May 14, 1845," undertook to designate the two papers published in the county of Greene which should publish such laws. Upon the ballot which was taken to accomplish that object, the Catskill Examiner received five votes, the Windham Journal received five votes, and the Catskill Recorder four votes. The chairman of the board, immediately after the result of the ballot had been announced, decided that the Examiner and Journal had been selected, and so also the board of supervisors, on a subsequent day, declared by resolution.

It is conceded that the Examiner and Journal are of opposite politics, the former being a republican paper and the latter a democratic one, and that they fairly represent the two

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principal political parties into which the people of the county are divided.

It is also conceded that the Recorder is a democratic paper, and would likewise fairly represent the sentiments of the democratic party; and it is further averred, in the moving papers, that the Recorder was the choice of a majority of the members of the board of supervisors who had been elected upon the regular democratic tickets in the various towns.

The legal position of the applicant for the writ is, that as the two papers claimed by the board to have been selected received an *equal* number of votes, there has been no selection.

The statute (chap. 215 of Laws of 1870) declares the appointment shall be made in the following manner: "Each member of the board of supervisors shall designate by ballot one newspaper printed in the county to publish the laws, and the paper having *the highest* number, and the paper having *the next highest* number of votes, shall be the papers designated for printing the laws, provided such papers are of opposite politics, and fairly represent the two principal political parties into which the people of the county are divided."

It being conceded that the two papers which the board of supervisors claim were designated "are of opposite politics, and fairly represent the two principal political parties into which the people of the county are divided," the question which the motion presents is, when three papers are voted for, and the two claimed to have been selected received an equal number of votes, has there been a selection, as the statute in plain terms declares that "the paper having *the highest* number, and the paper having the *next highest* number of votes, shall be the papers designated?" In other words, when the law is plain and unambiguous in its language, and there is no expression, word or clause in the act limiting, construing or explaining the words used, can it receive any other construction or interpretation than that which its language plainly and directly calls for.

It was warmly contended upon the argument that in the

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enactment of this law the legislature did not *intend* what it has *said*, and that it should be read, "the *two* papers having the *highest* number of votes shall be the papers selected." It is, perhaps, a sufficient answer to this argument, to state that conceding the *intent* to enact a law in the form which is urged as the embodiment of such intent in words, yet as such words have not been employed, "that effect can not be given to an intention not expressed" (*Potter's Dwarries on Statutes*, 193). Any attempted construction of the act, however, which departs from its language, and purporting to be based upon the intention of the legislature, in the absence of any key to the meaning of the words afforded by other parts of the act, is mere speculation and must necessarily vary with the convictions of the reasoner as to what the law should have been. It is freely conceded that it would, perhaps, have been better and wiser to have so framed the law that the ballot taken in this case would have resulted in making the attempted selection a legal one; but the question is not what the law should have been, but what it is. The enactment is the result of the reasoning of many different minds, having perhaps different intents and motives, and it is therefore impossible for any court or individual to discern the intent of the framers and enactors of this statute to be otherwise or different from what has been said. No phrase or word in the act, as has already been suggested, can be found to show that what has been said was not meant. Nay, it can be supposed that the legislature intended their language to be literally followed. We know, for the act so declares, it was designed that the papers selected should fairly represent the two great political parties into which the people of the county were divided; and perhaps it was thought that by declaring "the papers designated" should be "the paper having the highest number, and the paper having the next highest number of votes," combinations between a minority of supervisors of one party, and the supervisors of the other party, by which the designation could be controlled, against the choice of a majority of the

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supervisors of the party represented by the paper to be excluded, would be rendered more difficult and less frequent. It is not unreasonable to assume that the legislature intended that the members of the board of supervisors, which formed a majority of those of one political faith, should control the selection of the paper to represent the party to which they were attached, and also supposed, because it was thus selected, it would better reflect the will of that party than one designated by a minority of such party through a combination with its political opponents. The framers and enactors of the law could not but know, when there is more than one paper of the same political party in a county, that one, by its rigid support of its party men and measures, will make itself more odious to the members of the opposite party than the other, which carries a free lance, and is more liberal in its treatment of its opponents. It frequently happens, and perhaps the present case affords an illustration, that the more liberal paper has party friends in the board, who, though a minority of its own party, can by a union with its opponents manage to have itself and the paper of opposite faith designated to print the laws; and yet the combination when made may be unable to literally comply with the statute, by making the vote of one greater than the other, and still give to the one having a vote less in number than the highest a larger vote than the paper which is to be excluded. Who can say that this all was not foreseen by the enactors of the statutes under consideration, and that the words which it contains were not purposely inserted to make any combination to produce such a result, if not impossible, at least difficult?

But why speculate as to the intent? We have plain language for our guidance, embodying a meaning which seems free from doubt, and it is safer and better to follow the statute as embodying the legislative will than to interpolate and change words so as to conform its intent to our views of what it should have been. ALLEN, J., in *McCluskey* agt. *Cromwell* (11 N. Y., 593, 601), well said: "It is beyond

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question the duty of courts in construing statutes to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But in the construction, both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning." To the same effect are also the following cases: *Purdy* agt. *The People* (4 Hill, 397, 403); *Walker* agt. *Harris* (20 Wend., 561-2), and also *Dwarris on Statutes* (Potter's ed., 193). Following this plain rule as the guide, it is impossible to say "*the highest*" and "*the next highest*" mean *the two highest*, any more than it would be possible to say, if one was describing two persons out of many by their height, and in so describing them said: "A was *the highest*, and B the *next highest*," that he intended thereby to say that the two were *equal* in height of stature. If the vote cast when the alleged designation was made, which was fourteen in all, had been differently given, say eight for the Examiner, and three for the Journal, and three for the Recorder, there would clearly have been no choice, because, though you would have one paper which could be called "*the highest*," you would have none that could be called "*the next highest*." If, in the supposed case, the words "*the next highest*" must be operative in the designation, as will be conceded, why are not the words "*the highest*" of equal significance? If a tie vote in the one case prevents a choice, why does it not equally prevent one in the other? It certainly and clearly does, if words have any significance, and language is indicative of intent.

In construing this law the conclusions reached are (1st) that if the legislature has not said what it intended to say, that

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then the unexpressed intent has not been enacted ; and (2d) if the court has the power to nullify words and to supply others in order to give force to a supposed legislative intent, that it cannot do so when the language is clear, precise and unequivocal.

In announcing these conclusions I am well aware that other minds will take a different view of the statute under consideration. Believing, however, that the courts are to interpret and not frame laws, to my own mind the result is clear and not to be avoided. The enunciation of such conclusion brings me to the last question which this motion presents: Should the *mandamus* asked for be granted?

By the act, it is made "the duty of the board of supervisors in the several counties of this state, at their annual meeting, to appoint the printers for publishing the laws in their respective counties." That duty has not been discharged, and a duty imposed by law can be compelled to be discharged. This court has no power to inform the board what papers it should select, but it can and does inform it what is the proper construction of the statute, and how a selection must be made. It is true that the act does not require a second ballot, or a third ballot, but it does require a selection or designation, and states how it shall be made. It was unnecessary to expressly confer the right to cast a second or additional ballots, for when an act is to be done the right to do everything necessary to complete the act is conferred by implication. One ballot having failed to make a designation, as required by law, the right to take others follows.

The *mandamus* asked for should be granted, but without costs.

The People *ex rel.* Lawrence agt. Mann *et al.*

SUPREME COURT.

THE PEOPLE *ex rel.* ALFRED LAWRENCE agt. ELIAS
MANN *et al.*

Justices of the peace — Persons over seventy years of age prohibited from holding such office — Practice — Writ of prohibition proper remedy — Constitution, article 6, section 13.

Justices of the peace are "justices or judges of any court" within the meaning of section 13, article 6 of the constitution. Persons over seventy years of age are ineligible to office. Writ of prohibition is the proper remedy against a person acting as justice of the peace who is over seventy years of age.

Orange County Special Term, January, 1884.

MOTION upon temporary writ granted by justice DYKMAN for writ of prohibition against Mann, acting as a justice of the peace, in suit against relator on the ground that Mann is over seventy years of age.

W. H. Ely, for relator.

Mr. Millard, for respondents.

BROWN, *J.* — Elias Mann was elected a justice of the peace of the town of Greenburgh, Westchester county, for a term of four years, commencing January 1, 1884. He was seventy years of age on the 11th day of July, 1881. The question presented in this proceeding is, "Was he eligible to the office?"

Section 13, article 6 of the constitution, provides for the manner of choosing justices of the supreme court and judges mentioned in section 12, viz., judges of the superior court of New York, the superior court of Buffalo, the court of common pleas of New York, and the city court of Brooklyn. It then provides that the term of office of "said justices and judges" shall be fourteen years. Then follows the provision

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that "no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age."

It is clear, I think, that in construing this provision it is not to be restricted to the immediate context, for if such construction be adopted it would not apply to the judges of the court of appeals.

Moreover, in the cases of *People agt. Gardner* (45 N. Y., 812), and *People agt. Brundage* (78 N. Y., 403), the court of appeals held that the restriction applied to county judges, who are not named in immediate connection with this provision. In the latter case much stress is laid upon the legislative construction of this provision, given it by chapter 86, Laws of 1870.

By that statute the judges therein named are required to file with the secretary of state a certificate in which shall be stated the time when their official terms will expire, whether "by effluxion of a full term or by reason of disability of age." The officers named in this statute are those for whose election the secretary of state is required by law to give notice. A justice of the peace is not one of such officers, and is therefore not named in the statute. We do not obtain from this statute, therefore, the opinion of the legislature as to the application of the provision to the class of officers we are considering. But we do have, however, contemporary legislative construction to this effect: that the language of the constitution is not to be limited to its immediate context, but is to be given a broad and comprehensive meaning.

Giving to the language used, therefore, its broad, general meaning, the question whether this provision applies or not to justices of the peace depends on the fact whether such officers were "justices of a court" within the meaning of that term, as used in the constitution.

Provision is made by section 18 for the election of justices of the peace in the towns and cities of the state. Provision is also made in this section for the removal of "justices of the

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peace and judges and justices of inferior courts not of record." It would seem from this expression as if a distinction was made between "justices of the peace" and "justices of inferior courts," but reading this provision in connection with section 19, I think the expression "judges and justices of inferior courts" has reference to the officers provided for in the latter section.

There are throughout the cities and villages of the state a number of local courts of civil and criminal jurisdiction, whose judges or justices are elected under special statutes, and who would not come within the general designation of justices of the peace, but do come within the designation of justices of inferior courts. The office of justice of the peace has existed since the formation of the state government, and in the year 1824 "courts of justices of the peace" were established by the legislature (*Chap. 236, Laws of 1824.*)

It was therein provided that "every such justice is hereby authorized to hold a court for the trial of all such actions, * * * and is hereby vested with all such powers for the purpose aforesaid, as is usual in courts of record in this state." This provision has remained a part of the law of the state ever since its enactment. It is embodied in the Revised Statutes of 1830 and in the Code of 1849, under titles designated "courts held by justices of the peace," and is substantially re enacted in the Code of Civil Procedure (*Sec. 3.*)

The statutes of the state, at the time of the adoption of the constitution, further provided for "special justices' courts," such as "the justices' court of the city of Albany" and "the justices' court of the city of Hudson." "A justices' court" or "a court of justices of the peace" therefore existed as one of the courts of the state in the different towns and cities throughout the state at the time of the adoption of the constitution, and the expression in the constitution "justices of a court" must be held, I think, to include the justices of such courts. It is certainly broad enough to include them, and as we have seen the judicial and legislative

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construction given to this provision is that it is not to be restricted to the officers named in the immediate context, we can adopt no other interpretation, except to give it its broad meaning and include within it all officers that come within the general designation used. In *People agt. Gardiner*, FOLGER, J., says: "It is palpable that the intention of the convention was to place this limit of age upon the comparatively very extended term which they adopted and to guard against the possible evil which the lengthened term alone suggested as possible." If this was the only reason for the insertion of this restriction in the constitution, it would not apply to justices of the peace, as their terms of office were not extended, but I think the law was also based upon the assumption of incapacity on account of the age, for certainly a person at seventy years of age, who had served for a long term could not be said to have less capacity to perform the duties of his office than if he had served a short term.

But then there is nothing in the terms of the constitution to distinguish between the officer elected for a long term and the one elected for a short term, between the justice of the supreme court and the justice of the peace; both come within the broad, comprehensive term of "justices of a court," and both fall within the reason of the restriction, if it is assumed to be based on incapacity on account of age.

Certainly if there was wisdom in applying this restriction to the terms of the judicial officers of the state, no reason exists why it should not apply to those of the lower grades as well as to those of the higher courts.

My attention is called by the respondents to section 54 of the Code of Civil Procedure, which requires "judges of court, of record to file certificates of the time when their terms of office will expire, either by completion of a full term or by reason of the disability of age," and it is argued as justices' courts are not courts of record, that this section must be taken as indicating the opinion of the legislature that the provision under discussion does not apply to those officers. I do not

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concur in this view, but I think that this section of the Code, which is a substitute for the law of 1870, hereinbefore referred to, is a further indication that the provision was intended to apply to judges of all courts.

The argument for the respondents is that justices' courts are not mentioned or referred to in the constitution and therefore justices of the peace do not fall within the term "justices of a court," but the same may be said of the marine court of New York, the surrogates' courts of the several counties, and the other courts mentioned in section 2 of the Code, all of which are now courts of record. It would seem from section 54 that in the opinion of the legislature the restriction as to age applied to judges of all courts of record. But if the restriction applies to surrogates, recorders of Utica and Oswego, and "justices of the justices' court of Albany," why not to justices of the peace generally? who, as I have shown, are "justices of a court."

At the time of the adoption of the constitution many of the courts mentioned in section 2 of the Code were not courts of record and are not mentioned or referred to in the constitution; yet clearly in the opinion of the legislature the constitutional restriction as to age applies to the judges of such courts.

I am unable to find in the language of the constitution, or in what seems to me to be the true reason of the restriction, anything upon which one class of judicial officers can be distinguished from another, and my conclusion is that it was intended to apply this restriction to the judges and justices of all the courts of the state whatever their grade or jurisdiction. Justices of the peace are clearly "justices of a court" within the fair meaning of that term, and fall within the restriction.

A final order must therefore be entered, awarding an absolute writ against the respondents, but without costs.

Barclay agt. Culver.

SUPREME COURT.

LOUISA H. BARCLAY agt. DELOS E. CULVER.

Code of Civil Procedure, section 3253 — Extra allowance — Basis of computing — Plaintiff in a difficult and extraordinary case who recovers and defeats a set-off is entitled to an allowance on both the claim established and the set-off defeated.

In a difficult and extraordinary case, where the defendant interposes to plaintiff's claim as a defense and by way of a set-off two promissory notes, and upon the trial judgment is rendered for plaintiff upon all the issues involved and for the full amount claimed, the plaintiff is entitled to an extra allowance, not only upon the sum recovered in the action, but upon the basis of the defendant's set-off determined against him.

Special Term, February, 1884.

APPEAL from taxation of costs by clerk.

This action was brought by plaintiff, to whom the claim in suit had been assigned, to recover of defendant the sum of \$2,500 and interest. Defendant interposed as a defense and by way of set-off two notes, which with interest were of the aggregate value of \$7,996. Upon the trial judgment was rendered for plaintiff upon all the issues involved, and for the full amount claimed by her with interest. The court granted an allowance of five per cent. Plaintiff, upon the taxation of costs by the clerk, claimed that the per centage allowed should be calculated upon the plaintiff's recovery and upon the amounts pleaded as set off by defendant, as these constituted "the value of the subject-matter involved." The clerk refused to tax an allowance on the set-offs, and taxed it only on plaintiff's claim. From such taxation this appeal was taken.

William King Hall (Hall & Blandy), for plaintiff, cited Woonsocket Rubber Company agt. Rubber Clothing Company (1 N. Y. Civil Pro., 350); S. C. (62 How., 180, citing cases); Williams, agt. Western Union Telegraph Company (61 How., 395; Conaughty agt. Saratoga County Bank (92 N. Y., 401).

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Henry D. Betts (Culver & Betts), for defendant, cited *People agt. New York and Staten Island Ferry Company* (68 N. Y., 71-83); *Ogdensburg and Lake Champlain Railroad Company agt. Vermont and Canada Railroad Company* (63 N. Y., 176).

LAWRENCE, J. — I think that the plaintiff is entitled to the full allowance which she claimed on the taxation. The amount of the alleged set-off was, I think, directly involved in the case (*Woonsocket Rubber Co. agt. Rubber Clothing Co.*, *supra*; *Vilmar agt. Schall*, 61 N. Y., 564).

U. S. CIRCUIT COURT.

FRANCIS A. FOGG agt. CLINTON B. FISK.

Removal of cause from state to United States courts — Examination before trial — Examination actually pending at time of removal — Right to continue — Code of Civil Procedure, sections 870, 881, 883.

Where an action was begun in the state court and an order thereafter obtained under sections 870, &c., Code of Civil Procedure requiring the defendant to appear and testify before trial, and whilst the examination of the defendant was being had under such order, he removed the cause into the circuit court under "the local prejudice act:"

Held, that although in actions at law begun in the federal courts depositions cannot be taken under the state practice, yet where, as in this case, such an examination was actually pending at the time of removal, the right to continue the same is preserved under the act of congress of 1875, and on motion the defendant will be compelled to attend and testify under the order, although the plaintiff may not be entitled to read the deposition upon the trial.

Instances in which such depositions may be used.

Southern District, of New York, January, 1884.

John R. Dos Passos, for plaintiff.

Wheeler H. Peckham, for defendant.

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WALLACE, J.—At the time this suit was removed from the state court by the defendant his examination as a witness was pending under an order of that Court directing him to appear and be examined before the trial as a witness at the instance of the plaintiff. By the Code of Civil Procedure of this state, a deposition thus taken may be read in evidence by either party at the trial of the action, and also in any other action brought between the same parties, or between parties claiming under them or either of them (*sec.* 881), and has the same effect as though the party were orally examined as a witness upon the trial (*sec.* 883).

The plaintiff now moves for leave to proceed with the examination of the defendant pursuant to that order, and the defendant resists the application upon the ground that the examination of a party before the trial as a witness for the adverse party is not permitted by the practice of this court.

It is well settled in this circuit that section 914, United States Revised Statutes, for conforming the practice of the federal courts in suits at common law as near as may be to that of the state courts, does not apply to the taking of testimony, because the statutes of congress cover the whole subject, and these statutes not only do not provide for the examination of a party as a witness for the adverse party before the trial in actions at law, but do not permit evidence thus obtained to be used upon the trial as a substitute for the oral examination of the witness (*U. S. R. S., sec.* 861; *Beardsley agt. Littell*, 14 *Blatch.*, 102; *U. S. agt. Pings*, 4 *Fed. R.*, 714).

If, therefore, this were an action originally brought in this court, the plaintiff should not be permitted to proceed with the examination of the defendant. But the removal act of 1875 carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the state court.

Section 4 declares that when any suit is removed from a state court to a circuit court of the United States, all injunc-

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tion orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. By force of this provision the plaintiff is entitled to proceed with the defendant's examination, unless for some substantial reason the revisory power of this court should be exercised to deprive him of the benefit of the order he has obtained and the proceeding he has instituted. It lies with the defendant, therefore, to present some controlling reason to the judicial discretion for denying to the plaintiff the right which he had secured, and of which he could not be deprived except by a removal of the suit.

That both parties have deemed this proceeding an important one, is obvious from the tenacity with which the right to pursue it has been contested. It appears by the record and moving papers that the defendant has been defeated in efforts to vacate the order for his examination by the supreme court at special term and at general term, and by the court of appeals, and that although for a period of eighteen months he was willing to submit his rights to the state courts, he invoked the jurisdiction of this court when there was no other resources left by which he could escape an examination. Certainly there are no equities which should induce this court to deprive the plaintiff of the fruits of his long struggle. If the examination of the defendant could subserve no useful purpose to the plaintiff, undoubtedly the defendant should not be subjected to it, or be put to the annoyance or inconvenience which it might entail upon him. But although the defendant's testimony, when obtained, may not be of service to the plaintiff to the full extent it would be in the state courts, it may nevertheless be of some value. If it cannot be used on the trial of this action as a substitute for the oral examination of the defendant, it can be as the declaration of a party; and it can also be used in other suits in the courts of this state between the same parties or their privies, pursuant to section 881 of the Code.

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There seems to be no reason, therefore, for dissolving or modifying the order of the state court, or for denying to the plaintiff the benefit of the proceeding which was pending when the defendant removed the suit.

The motion is granted.

SUPREME COURT.

CATHARINE A. FIELD agt. MARTIN FIELD, as executor, &c.

Alimony — Absolute divorce — Obligation to pay alimony is a personal one — Action cannot be maintained against representatives of husband's estate for alimony accruing after husband's death.

Where a final decree has been made in an action for divorce on the ground of adultery, directing the payment of alimony by the defendant during the life of the plaintiff:

Held, that the obligation to pay such alimony is a personal one, and the decree must be construed to mean during the lives of both parties, and upon the death of the defendant the right to the same is at an end, and no action can be maintained by the wife against the representatives of the husband's estate for alimony which may subsequently accrue.

Special Term, January, 1884.

The complaint alleges that the plaintiff was married to one Richard Field, in his lifetime. That said Field made a will and appointed the defendant his executor. That said Field died October 27, 1882, leaving said will, which has been duly proved, and letters testamentary issued thereon to the defendant. That an advertisement was duly published for creditors to present claims. That in the lifetime of said Richard Field, and in the year 1878, the plaintiff recovered a judgment in the supreme court of this state dissolving the marriage between the plaintiff and said Richard Field on the ground of adultery by said Field, and it was provided by said judgment that said Field should pay to the plaintiff the sum of fifty dollars per month during her life. That no payment had been made

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since October 1, 1882, and that the plaintiff has duly presented her claim for alimony falling due since his death to the defendant as executor of the said Richard Field, and which claim has been rejected, &c. The defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

Abram Kling, for defendant.

Francis C. Reed, for plaintiff.

VAN BRUNT, J. — The question involved upon this demurrer is whether a husband's estate against whom a decree of divorce has been granted can be made liable to pay alimony accruing after the death of the husband. It may be true that the decree in the case at bar, read strictly, supports this claim, but the question remains whether the statute authorizes the court to make such a decree, and whether the court intended the decree to have any such effect. Although the counsel for the plaintiff cites several cases in which he claims it to have been decided that the court has power to direct the payment of alimony by the husband after his death, I have failed to find that any such questions was involved in any one of those cases.

The provision of the statute simply authorizes the court to compel the husband to fulfill his marital obligations — viz., support his wife — although the marital bond has been severed because of his fault and nothing more. The vested rights secured by marriage are expressly reserved. The wife, notwithstanding the dissolution of the marital relation, has her dower in all the real estate of the husband owned during coverture, which was all the right which had attached to the husband's property by virtue of the marital relation. The husband has the right to dispose of all his property without the consent of his wife, except that he cannot deprive her of her dower in the real estate owned by him during coverture, and this right is preserved to the wife notwithstanding the decree dissolving the marriage contract. The husband is bound

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within his means to support his wife as long as he and she shall live, and no longer, and this duty is enforced by a provision in the decree for permanent alimony.

The statute only empowers the court to enforce this obligation and no more, and nowhere contemplates interference with the power of disposition of his estate by the husband, which does not conflict with the duties imposed by the marital relation. If this is not true, we have this anomaly presented to us: That although the amount of permanent alimony depends very largely, in most cases, upon the income of the husband, derived from his personal efforts, that yet when this source of revenue is entirely withdrawn, his estate is liable for the same amount of alimony, although if that had been the only source of income not one-tenth part of the alimony granted would ever have been allowed.

We are also confronted with this peculiar condition of affairs: If the husband should happen during coverture to have been possessed of real estate, the income of the former wife would be greater, the husband being dead, than if he were alive, as she would not only be entitled to receive the alimony granted by the court, but also to recover her dower out of his real estate. These facts, it seems to me, clearly show that the obligation to pay alimony is a personal one, dependent upon the means of the husband during life, and does not give the court any power to incumber the estate of a man after death who had performed his obligations of support and maintenance to his wife during his life.

It might be urged, in answer to the suggestion, that although the amount of alimony in most cases depends upon the ability of the husband to earn during his life, that when that means of income is cut off the court may decrease the alimony to meet the new condition of affairs; but it is sufficient to say, in reply to this suggestion, that, the defendant dead, there is no person who could move the court, as the action is entirely personal and does not survive the death of the defendant, and no such relief could be granted by the court.

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It seems therefore clear that the statute never intended that with the income reduced because of the death of the husband that the wife should be in a better condition by reason of her right to dower than she occupied during his life.

I am of the opinion then that the obligation to support and maintain a wife being only personal, and the provision of the decree that the defendant pay her being only personal, that the statute only authorizes the court to enforce that obligation and no more, and as this obligation ceases upon the death of the husband, alimony as such must then cease.

Demurrer sustained, with costs.

SUPREME COURT.

N. W. HOOKER agt. H. D. TOWNSEND.

Sureties on appeal — Liability of defendant where the undertaking of surety has not been formally approved — Code of Procedure, sections 334, 335, 336, 338, 340 — Code of Civil Procedure, section 1335.

After two sureties, A. and B., had executed a joint and several undertaking under sections 334 and 338 of the old Code for a stay of proceedings on appeal, A. justified, but when subsequently B. was examined, the justice before whom the examination took place filed a memorandum that he was not qualified, and that defendant in the action must produce another surety. Meantime, intermediate the filing of the memorandum and the entry of an order thereon, the defendant executed the undertakings upon which this action was brought, which were approved.

Held, that by the memorandum and order referred to, the justice approved of A. as one of the sureties upon the undertakings; that it was not necessary that A. should join in the execution of the undertakings with defendant, and even if A. is not liable upon his undertaking for want of a formal indorsement of approval upon it, the defendant should not be relieved from liability on his undertakings, which stayed plaintiff's proceedings.

At Circuit, January, 1884.

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Townsend Wandell and Edward S. Clinch, for plaintiff.

George C. Coffin and Robert S. Green, for defendant.

LAWRENCE, J. — The order of July 17, 1875, provided for a stay of proceedings on the appellants giving undertakings in compliance with sections 334 and 338 of the old Code of Procedure. On the 11th of August, 1875, undertakings were executed in each of the actions by Howard A. Martin and Runyon W. Martin, which undertakings were filed on the 14th of August, 1875. These undertakings were joint, and not joint and several. On the 6th of September, 1875, an order was made dismissing the justification of the sureties, and reciting as a ground therefor that the said sureties had failed to appear. The order also recited that the justification had previously been adjourned by stipulation, after the examination of one of said sureties. On the 7th of September, 1875, an order was made requiring the plaintiff to show cause why the order made dismissing the justification of the sureties should not be vacated, and the said sureties allowed to justify, &c., and staying plaintiff's proceedings in the meantime, and until the further order of the court. This order was obtained upon an affidavit made by James B. Kissock, which stated that on the second day of September, pursuant to notice and adjournment, Runyon W. Martin, one of the sureties justified, and that on account of the illness of Howard A. Martin, the other surety, the further examination was adjourned until the fourth instant. That on that day the plaintiff's attorney would not adjourn said examination until longer than the sixth instant; that by reason of the negligence and oversight of a messenger, notice to that effect did not reach the surety, and on that day, no one appearing to oppose, the plaintiff's attorney obtained and entered an order dismissing the justification of the sureties, although one surety had already justified. Howard A. Martin was subsequently examined, and on the fourteenth of September Mr. justice BRADY, before whom the examination had taken place, filed a memorandum,

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which was published in the Daily Register of September fifteenth, as follows: "Howard A. Martin is not qualified as a surety. The defendant must produce another, and serve notice of justification within five days from the entry of the order. Justification to be on two days' notice." No order seems to have been entered upon this decision of Mr. justice BRADY until the 24th of September, 1875. That order, in substance, recites the decision of the fourteenth of September, and directs the defendant to furnish another surety to the undertakings required in these actions, and to serve notice of justification and to justify within the time specified in said order, and that in default thereof the stay of proceedings be vacated and removed, &c. It is quite clear to me that by the memorandum aforesaid, and his order of September twenty-fourth, Mr. justice BRADY accepted and approved of Runyon W. Martin as one of the sureties upon the undertaking directed to be given by the order of July 17, 1875. In the meantime, intermediate the filing of the memorandum of Mr. justice BRADY and the entry of the order thereon on the 24th of September, 1875, the defendant on the 16th of September, 1875, executed and acknowledged the undertakings upon which these actions are brought. His examination was taken on the seventeenth of September, and pinned to the two undertakings, each of which had indorsed thereon these words: "The within undertaking is hereby approved as to its form and the sufficiency of its sureties. Dated 22d of September 1875." Only the approval on the outside paper is signed by justice DONOHUE, but I cannot accede to the proposition that as the examination taken before the notary public is pinned to both of the undertakings, and as the three papers were treated as one, that the omission of the justice to indorse the inner undertaking is to be regarded as an indication that he had disapproved thereof. On the contrary, I am of the opinion that the indorsement of the justice is to be regarded as an approval of both the undertakings, it being quite evident that on the submission

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of the undertakings and examination, the three papers were regarded as one.

I think, therefore, that it is too late for the defendant to object that he never became bound by the undertakings in question. In this connection it should be borne in mind that under section 340 of the old Code of Procedure, the undertakings prescribed by sections 334, 335, 336 and 338 might have been in one instrument or several, at the option of the appellant, and it was not necessary therefore that Runyon W. Martin should join in the execution of the undertaking with the defendant. In *Gottwald agt. Tuttle* (7 *Daly*, 105) the general term of the court of common pleas held that under this section, where an undertaking by two sureties fails of approval, because one of the sureties is insufficient, if afterwards a separate undertaking is executed by another surety alone, he is bound, although the former undertaking, by reason of having failed of approval, has become void. Even if, therefore, Runyon W. Martin, notwithstanding the decision of Mr. justice BRADY, is not liable upon the undertaking executed by him, for the reason that it does not appear that there was a formal indorsement of approval upon Martin's undertaking, I do not see why the defendant should be relieved from liability on undertakings which have received, as we have seen, the approval of the court (*See Ward agt. Whitney*, 3 *Sand.*, 399; *Shaw agt. Tobias*, 3 *Comst.*, 188; *Gottwald agt. Tuttle*, 7 *Daly*, 105).

I shall not undertake to consider in this case whether the defendant, under Rule 8 (now Rule 5 of this court), was precluded from becoming a surety on these undertakings, for the reason that, if I am correct in my understanding of the facts, that question was passed upon by the court on the approval of the undertaking, and the defendant is therefore estopped from questioning his liability (*See Gerould agt. Wilson*, 81 *N. Y.*, 578).

The case of *Manning agt. Gould* (90 *N. Y.*, 476) does not seem to me to be in point, for the reason that it was given

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under section 1335 of the new Code, which declares that "if the judge finds the sureties sufficient, he must indorse his allowance of them upon the undertaking, or a copy thereof, and a notice of the allowance must be served on the attorney for the acceptant. The effect of a failure so to justify and to procure an allowance is the same as if the undertaking had not been given." In this case, if I am right, the surety, Runyon W. Martin, appeared and justified, and was approved of by justice BRADY, and the defendant appeared, justified and was approved of by justice DONOHUE.

The case of *Post* agt. *Doremus* (60 *N. Y.*, 371) seems to have rested upon the ground that an actual stay of proceedings by the respondent's attorneys, under a supposition that an insufficient undertaking was legally sufficient, did not constitute a consideration for the undertaking, and that as the appeal was from an order, the provision in the undertaking that "if the judgment as appealed from, &c.," was affirmed, &c., the appellant would pay "the amount directed to be paid by the said judgment," did not cover the affirmance of an order, nor the amount directed to be paid thereby. The criticism was further made in that case, that as the order appealed from named no amount, there was nothing in the order by which the liability of the surety could be measured. I do not regard that case, therefore, as laying down any rule which obliges me to hold that the defendant is exempt from liability upon undertakings into which he has voluntarily entered, and on the faith of which the plaintiffs in this action acted in staying proceedings. As to the case of *Gross* agt. *Bouton* (9 *Daly*, 25), it is sufficient to say that I do not consider it as overruling the well considered decision of the same court in *Gottwald* agt. *Tuttle* (7 *Daly*, 105).

Since the above was written my attention has been called to the opinion of the general term of this department in the case of *Grimwood* agt. *Wilson* (*ante*, 283.) After perusing that opinion I see no reason for departing from the conclusion at which I have arrived. There is a great difference between

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the two cases. In *Grimwood's case* the surety executed the undertaking with the express understanding that it was to be executed also by another surety. Here there was no such understanding or arrangement, and there were also two sureties, to wit: Martin, who had been approved of by Mr. justice BRADY, and the defendant; and, as we have seen, it was held under the old Code that there might be two separate undertakings (*See 7 Daly, 107, supra*).

The defendant, I must hold from the evidence, clearly knew the character of the instruments which he was executing. They operated in fact as a stay upon the plaintiff's proceedings, and unless the cases cited in this opinion are to be considered as reversed, he is legally bound to perform the obligation assumed by him.

There must be judgment for the plaintiff for amount claimed.

N. Y. COMMON PLEAS.

VICTOR HEIN, appellant, agt. ALEXANDER V. DAVIDSON,
respondent.

Liability of sheriff — Constitutional law — Code of Civil Procedure, sections 1421 to 1425 — Provisions of these sections declared unconstitutional and void.

The provisions of sections 1421 to 1425 authorizing the substitution of sureties to the relief of the sheriff, sued for wrongful levy or attachment, are unconstitutional and void.

General Term, January, 1884.

More, Aplington & More, for appellant.

Morris Goodheart, for respondent.

VAN BRUNT, J. — The sole question raised on this appeal involves the power of the legislature to pass sections 1421 to

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1425 of the Code, whereby it has undertaken to authorize the court to relieve the sheriff from liability for a trespass in cases where he has received indemnity, and substituting the responsibility of the indemnitors therefor. There is no claim made by the appellants here but that the provisions of the Code, as they now exist, seem to protect the rights of the plaintiff to a reasonable degree, but it is urged that if the legislature has the right to exempt the sheriff from liability for a trespass under any circumstances, they have a right to remove the safeguards which now surround the exercise of the power and leave the party aggrieved to his remedy against the plaintiff on the execution or attachment, by virtue of which the sheriff claimed to be acting at the time of the alleged trespass.

It seems to me that it follows, as a matter of course, that if the legislature can say that a sheriff shall not be liable for the taking of the property of a third party, where he claims to act by virtue of process against another, under any circumstances, they can equally well say that he shall not be liable for such a trespass under all circumstances.

In other words, if the legislature can say that where the sheriff takes, by virtue of an execution against A., the property of B. at the instigation of C. and D., that B.'s only remedy shall be against C. and D., and that the sheriff may be exonerated from all liability, then they can equally well say that if the sheriff, although not indemnified, takes the property of B. under an execution against A., that B. shall have no right of action against the sheriff. Such legislation would seem to be a direct violation of the provision of the constitution which declares that no person shall be deprived of life, liberty or property without due process of law.

In the case above presented a party would be deprived of his property without any redress whatever, the sheriff being freed from responsibility because he held process against another party at the time of the commission of the trespass. Although no process whatever existed against the parties injured, and although he never has had his day in court, his

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property is taken and he has no redress. It would seem at once that no such power exists in any legislature.

But it is urged that the above is not the case presented for determination upon this appeal. The Code gives the party aggrieved a remedy against other parties; that the order is discretionary with the court, that it gives the court ample power to insist upon such authority as it may think necessary to fully secure the plaintiff, and that therefore a different question is presented. The answer to this suggestion seems to be that if the legislature has the power to relieve the sheriff from liability, having provided these safeguards against such relief acting to the injury of the aggrieved, they are the judge of the sufficiency of such safeguards, and they may provide for proper protection of the rights of the parties aggrieved or they may make such provision of law as would give no security whatever to the injured party, and he would be remediless. The words "due process of law," mean something in the constitution, and they are just as significant in their relation to property as they are in respect to life and liberty, and it will not be claimed that any man can be deprived of either life or liberty without an opportunity to be heard.

If the acts of the legislature under consideration are valid, then the party injured may be deprived of his property without a particle of redress against the party causing him the injury, merely because he is a public officer and pretending to act under process. The citizen is entitled to as much protection in respect to his property against the trespasses of an officer of the law, who holds no process against him, as he would be against the trespasses of any one of his fellow citizens, and it will hardly be claimed that the legislature could say that a party whose property had been taken by another should have no remedy against the trespasser, but his remedy must be confined to some other parties who instigated the trespass. It cannot be that our citizens hold their property by so slight a tenure, and that the legislature have the right to say that

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they may be deprived of the same without their having any redress against the party causing the injury, because he is a public officer. A public officer has no greater right to commit wrongs than a private citizen, and where he is not protected by process against the injured party, he must be just as responsible for injuries caused.

It is true that in the case of *Hessburg* agt. *Riley* (91 N. Y., 377) the courts say in their opinion that there is no question as to the power of the legislature to make such a provision, but no such point appears to have been raised, and the order was attacked upon totally different grounds; and it may very well be that all that was intended to be said was, that there was no question in that case as to the power of the legislature to make such a provision. In any event, until there has been a distinct adjudication by our highest courts that the legislature have the power to say that a party injured shall have no redress against the party committing the injury, if such trespass was instigated by others, but that this sole remedy shall be against the instigators, I cannot believe that the rights of our citizens are so feebly protected by our constitution.

The order appealed from should be reversed, and the motion denied, with ten dollars costs and disbursements of this appeal, and ten dollars costs of the motion to abide the final event.

J. F. DALY and BEACH, JJ., concurred.

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SUPREME COURT.

ELIZA R. M. BIRDSALL agt. SOLOMON F. CARY and WILLIAM JACKSON.

Canals — Appropriation of lands by the state for canal purposes — What fee or interest in such lands state acquires by such appropriation — Does such fee or interest survive the abandonment of the canal.

When the Chenango canal was constructed defendants' grantor owned lot No 5, and plaintiffs' grantor owned lot No. 2, which adjoined five on the west. The state, previous to 1837, appropriated a strip of land from the east side of lot 5, and adjacent to lot 2 (appropriating no part of lot 2), for the Chenango canal. The persons interested in the premises never exhibited to the appraisers a statement of their claims. No appraisement was made of the damages and benefits resulting to them on account of the appropriation, and nothing was paid by the state for the land taken. The canal was completed in 1837, and was operated until May 1, 1878, when it was abandoned pursuant to chapter 404, Laws of 1877. In 1862 the plaintiff became, and has since remained, the owner of lot 2, east of and adjacent to the canal, and on the side opposite to the defendants' lot. In 1878 the defendants became, and have since remained, the owners of lot No. 5, on which the canal was built. In March, 1882, the plaintiff executed the release required by section 1 of chapter 551 of Laws of 1880, which was filed with and approved by the superintendent of public works, and recorded in Broome county pursuant to chapter 288 of Laws of 1881. In 1882 defendants entered upon the land east of the center line of the canal and damaged it, for the recovery of which this action is brought:

Held, first, that under 1 Revised Statutes (*sec. 16; Id. [7th ed.], 629, sec. 16*), the canal commissioners had power to appropriate land for the use of the canal.

Second. Entering upon the land and constructing the canal, amounted under the statute to a legal appropriation of all of the land within the blue or external lines of the canal. The legality or completeness of the appropriation did not depend upon a prior assessment or payment of damages.

Third. That the state acquired a fee or permanent interest in the land, which survived the abandonment of the canal, and which could be granted to the adjoining owner by the legislature.

Fourth. That plaintiff, by his compliance with the requirements of section 1 of chapter 551 of the Laws of 1880, derived from the state a title to the land in question which cannot be overthrown.

Broome Circuit, October, 1883.

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WHEN the Chenango canal was constructed defendants' grantor owned lot No. 5, and plaintiff's grantor owned lot No. 2, which adjoined five on the west. The state previous to 1837 appropriated a strip of land from the east side of lot 5 and adjacent to lot 2 (appropriating no part of lot 2) for the Chenango canal.

The persons interested in the premises never exhibited to the appraisers a statement of their claims; no appraisement was made of the damages and benefits resulting to them on account of the appropriation, and nothing was paid by the state for the land taken.

The canal was completed in 1837 and was operated until May 1, 1878, when it was abandoned pursuant to chapter 404, Laws 1877.

In 1862 the plaintiff became, and has since remained, the owner of lot 2 east of, adjacent to the canal, and on the side opposite to defendants' lot.

In 1878 the defendants became, and have since remained, the owner of lot 5 on which the canal was built.

Section 1, chapter 551, Laws 1880, provides: "Sec. 1. Except as hereinafter provided, all the estate, right, title, interest and property which the people of this state have heretofore acquired and now have in and to all the lands and water privileges taken and appropriated for the purpose of constructing and operating the Chenango canal, and what is called and known as the Chenango canal extension, commencing at and lying south of the stone culvert in the village of Hamilton, in the county of Madison, shall revert to and is hereby granted and released to and vested in the person or persons owning the lands adjoining to the center line of said canal, in consideration of and upon the condition precedent that such owner or owners shall, by an instrument in writing under their hands and seals and duly acknowledged, release and discharge the state from all obligation to maintain the bridges and other structures connected with such portions of said canal, and of said extension, and from all liability for

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damages arising from the abandonment thereof; whereupon they and each of them are hereby authorized and empowered to hold, grant, devise and convey the same."

In March, 1882, the plaintiff executed the required release which was filed with, and approved by, the superintendent of public works, and recorded in Broome county pursuant to chapter 288, Laws 1881.

The exception referred to in the first sentence of the section does not relate to the conditions of this case.

In May, 1882, defendant entered upon the land east of the center line of the canal, and damaged it, for the recovery of which this action is brought.

Ausburn Birdsall and *Mr. Prindle*, for plaintiff.

D. S. Richards, for defendants.

FOLLETT, *J.*—The decision of this case turns upon the question, whether the state acquired a fee or a permanent interest in the land, which survived the abandonment of the canal, and which could be granted to the adjoining owner by the legislature.

At the date of the appropriation in question the following sections of title 9, chapter 9, part 1, Revised Statutes, were in force:

SECTION 46. "When any lands, waters or streams, appropriated by the canal commissioners to the use of the public, shall not be given or granted to the state, it shall be the duty of the appraisers to make a just and equitable estimate and appraisement of the damages and benefits resulting to the persons interested in the premises so appropriated, from the construction of the work, for the purpose of making which such premises shall have been taken."

SEC. 48. "Every person interested in premises so appropriated, if he intend to make any claim for damages, shall, within one year after such premises shall have been taken for the use of the state, exhibit to the appraisers a statement

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of his claim, in writing, signed by himself, his guardian or agent, and specifying the nature and extent of his interest in the premises appropriated, and the amount of damages; and every person refusing or neglecting such claim within the time prescribed, shall be deemed to have surrendered to the state his interest in the premises so appropriated."

SEC. 49. "No claim for damages for premises that shall have been appropriated to the use of a canal, at any time before this chapter shall be in force, shall be received by the appraisers, unless it shall be exhibited within one year after this chapter shall become a law; and the premises so appropriated shall be deemed the property of the state; and no claims other than those exhibited, shall be paid without the special direction of the legislature."

SEC. 52. "The fee simple of all premises so appropriated, in relation to which such estimate and appraisal shall have been made and recorded, shall be vested in the people of this state."

SEC. 53. If the damages so estimated and appraised shall exceed the benefits, it shall be the duty of the canal commissioners to pay the amount of such excess of the damages to the persons appearing by the determination of the appraisers to be thereto entitled * * *."

The canal commissioners had power to appropriate land for the use of the canal (1 *R. S.*, 220, *sec.* 16; *Id.* [7th ed.], 629, *sec.* 16). Entering upon the land and constructing the canal amounted under the statute to a legal appropriation of all of the land within the blue or external lines of the canal. The legality or completeness of the appropriation did not depend upon a prior assessment or payment of damages (*Baker agt. Johnson*, 2 *Hill*, 342; *People agt. Hayden*, 6 *Hill*, 389; *Turrill agt. Norman*, 19 *Barb.*, 236; *Rexford agt. Knight*, 11 *N. Y.*, 312).

Whatever the rule may be in regard to private corporations, it is well settled that the state or any of its municipal subdivisions, may legally appropriate for public use the land of a

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citizen and acquire title thereto, if means are provided for making compensation afterwards, if claimed.

Upon the question of the extent of the interest acquired by the state in the lands appropriated, the following cases arising under the sections quoted, and earlier statutes, have been cited and deserve consideration :

In *Brinkerhoff* agt. *Wemple* (1 *Wend.*, 470) damages for land appropriated for the Erie canal had been appraised, pursuant to the statutes existing prior to 1825, and paid to one of two tenants in common. The co-tenant brought an action to recover half of the money. The defendant insisted that as the canal was finished before the conveyance to the plaintiff he had no right to the money. The court held that the completion of the canal did not divest the former owner of the fee of his lands occupied by it, and that under the following section the payment of the money seemed to be a condition precedent to the passing of the fee from the former owner to the people of the state. The law referred to was section 3, chapter 272, Laws 1817, and reads: "And the canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in the people of this state." Section 48 (1 *R. S.*, 226) above quoted was not enacted until 1827, and did not take effect until January 1, 1828, and after this case was decided.

In *Baker* agt. *Johnson* (2 *Hill*, 342) the state appropriated lands of the plaintiff for constructing the Black River canal, and contracted with defendant to build it on these lands. The defendant used in construction stone excavated from the appropriated lands, to recover the value of which the action was brought. An appraisement had not been had. It was held the state owned the stone, and that under the construction contract the defendant had the right to use them, and the plaintiff was nonsuited. It was said: "Although the absolute fee did not pass to the state until the appraisement of damages, yet the right to enter and use the property was perfect the moment the appropriation was made." The proposition

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contained in the first clause of the sentence quoted was not involved in and was unnecessary for the decision of the case.

In *Turrill agt. Norman* (19 *Barb.*, 263) the state appropriated lands of the plaintiff for enlarging the Erie canal, and contracted with defendant to build it on those lands under which the defendants entered and began work.

Chapter 485, Laws 1851 (by which revenues were disposed of and money raised to carry on the work), was, in May, 1852, declared unconstitutional (7 *N. Y.*, 9). The action was brought upon the theory that under the decision of the court of appeals the state was without power to appropriate the lands and that the defendant was a trespasser. But it was held that the commissioners had power to appropriate those lands for this purpose under prior laws and that plaintiff could not recover. As in *Baker agt. Johnson*, and upon its authority, it was said: "And although the title did not vest in the people until compensation made, or at least until the amount was ascertained and fixed in the mode prescribed, no action can be maintained by the owner for the injury." But, as in *Baker agt. Johnson*, the point stated in the first clause of the sentence was not involved.

The reports of these cases do not show when the appropriations were made, or that a year had passed since they were made, and the effect of section 48, above quoted, was not considered in either case.

In both cases the state having appropriated the lands and provided for making compensation, it had the right to use the lands without regard to the quantity of the estate then acquired, whether a fee or a right of user.

In the *People agt. White* (11 *Barb.*, 26), land of the defendant was appropriated in 1819 for the construction of the Erie canal, appraised and paid for. It was used until 1842, when that part of the canal was abandoned, and the defendant entered into possession and claimed the fee thereof. The people sought to recover the land, and it was held that the people took nothing but the use of the land, and that upon its

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abandonment for that use, the title reverted to the defendant, which supports the defendant's contention in this action. This case, though not referred to in *Rexford* agt. *Knight* (15 *Barb.*, 627; 11 *N. Y.*, 308), is clearly overruled by that case.

In the case last cited, land of Eleazer Rexford was appropriated in 1822, but whether with or without compensation was a fact in dispute between the supreme court and the court of appeals. Rexford conveyed to defendant's grantor in 1829, a piece of land bounded on the east by the canal. When the canal was enlarged, the foot of the west bank was built sixty or seventy feet from the westerly exterior or blue line of the old canal, leaving a strip of that width, of which the state made no use. The defendant entered and used it. The heirs of Rexford brought ejectment, claiming that the state never acquired title to it.

When the land was appropriated the statute read: "The canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in the people of this state" (*Sec. 3, chap. 272, Laws 1817*).

The general term held (15 *Barb.*, 627), that an appraisal had been had, the benefits adjudged equal to the damages, and that under the above quoted section the state acquired the fee, and nonsuited the plaintiff.

The court of appeals (11 *N. Y.*, 308, 309, 312), held the evidence insufficient to establish an appraisement, and that the state, under section 3, chapter 272, Laws 1817, above quoted, did not acquire the fee. The land having been appropriated prior to the adoption of part first of the Revised Statutes, the court of appeals held that section forty-nine above quoted, applied to the case, and that the state acquired the fee under that section, and affirmed the judgment. This case was commented upon and approved in the *Brooklyn Park Commissioners* agt. *Armstrong* (45 *N. Y.*, 242). The effect of this decision is that a statute is constitutional which provides that unless owners of appropriated lands claim compensation

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within the time limited they lose all right to compensation, and the lands become the property of the state.

Section forty-nine is not applicable to the case at bar, for these lands were appropriated after the chapter in which that section is contained took effect. But section forty-eight, above quoted, which is applicable, is quite as strong as to the effect of failing to claim compensation within the time limited. "The owner shall be deemed to have surrendered to the state his interest in the premises so appropriated." This section remained the law of the state and unchanged, until amended by chapter 836, Laws 1866, and under it, and *Rexford agt. Knight*, the defendant's grantor must "be deemed to have surrendered to the state his interest in the premises so appropriated."

As held by justice MURRAY in *Snyder agt. Canal Railroad Company* (*affirmed*, 13 *N. Y. W. Digest*, 329) the state may acquire title: (1) By appropriation and payment of the damages. (2) By appropriation and failure of the owner to present, within the time limited, his claim for damages.

In the manuscript opinion of the general term in the case last cited, it is said: "There is no satisfactory evidence that the then owner ever made any claim for damages within the year allowed by law. If he did not he was deemed to have surrendered all his interest in these lands to the state, whose title then became absolute (1 *R. S.*, 226, *secs.* 48, 49)."

It was said in *The Brooklyn Park Commissioners agt. Armstrong* (45 *N. Y.*, 240): "The extent of the right acquired in lands taken for public use depends in some measure upon the needs for which they were taken."

What were the needs of the state at the date of the passage of these statutes, and the intentions of the legislatures which enacted them?

By article 7, section 10, of the Constitution of 1821 then in force, it was provided: "And the legislature shall never sell or dispose of * * * the said navigable communications, or any part or section thereof; but the same shall be and

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remain the property of the state." The same provision is contained in the Constitution of 1846 (*Art. 7, sec. 6*).

That the needs of the state required, and that it intended to acquire, absolute title to lands within the blue lines is apparent from the sections quoted, and especially when read in the light of the then existing constitutional provisions.

When a state or municipal corporation has acquired the absolute title to land for public use, which use has been discontinued, the title does not revert, but may be granted to individuals for private purposes (*The Brooklyn Park Com'rs agt. Armstrong, supra*; *Hutderman agt. The Pennsylvania R. R. Co., 50 Pa., 425*).

Apart from the title acquired by appropriation, and failure of the owner to present his claim for damages within the time limited, the state acquired title by adverse possession.

When an entry on land is made under color and claim of title and it is held adversely for twenty years, title is acquired (*Cahill agt. Palmer, 45 N. Y., 478*; *Sherman agt. Kane, 46 Superior Ct. R., 310*; *affirmed, 85 N. Y., 577*; *Warfield agt. Lindell, 38 Mo., 561*; *Hale agt. Gladfielder, 52 Ill., 91*; *Trim agt. McPherson, 7 Caldwell, 15*; *Hopkins agt. Culloway, Id., 37*; *Chilles agt. Jones, 7 Dana, 528, 540*; *Wood's Lim., 489*; *Cooley's Const. Lim., 365*).

Under the Constitution and statutes quoted, the state for more than forty years in the most public and solemn manner claimed to own the land in question, and during all that time it occupied it under the claim, adversely to the defendants, their grantors, and all persons.

A state, or a political subdivision thereof, may acquire title by adverse possession (*Sherman agt. Kane, supra*; *Rhode Island agt. Massachusetts, 4 How., 591*).

In the case last cited it was said, at page 639: "For the security of rights, whether of states or individuals, long possession under a claim of title is protected."

In the construction of uncertain or equivocal statutes, if great public inconvenience necessarily flows from one construc-

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tion, it is a strong argument that such construction does not express the intention of the legislature (*Ram on Judgments*, chap. 6, sec. 1).

It is well known to all persons conversant with titles that the records of the counties through which the lateral canals were built show that in many and perhaps in a majority of cases claims were not filed by owners, probably upon the belief that the benefits equaled the damages. These owners have conveyed, bounding by or excepting the canals from their grants. In cities and villages the state encouraged the building of warehouses and factories upon lands adjacent to and partly on the unoccupied canal lands. Streets and alleys were opened and blocks erected with reference to the location of the canals. Since the abandonment of the Chenango, Chemung, Genesee Valley and Crooked Lake canals new streets on their sites have been opened and new blocks built upon the strength of the title derived from the state. It would be a calamity to cities, villages and adjoining owners, as well as a fruitful source of litigation if the title derived from the state can be overthrown.

If the state in such cases did not acquire the title with power to convey, can it be compelled to rebuild the abandoned farm bridges, and so reunite farms that will be severed by recoveries in ejectment, or can the state be compelled to restore the water courses changed by the construction and abandonment of canals? If the state cannot be compelled to do these things and will not, the adjoining owners are left without remedy.

The subdivided interests of heirs, if recoverable, would be of little or no value except as a source of annoyance to the adjoining owners, but a source of great injury to such owners, in many instances amounting to a destruction of the value of their property. And while this judgment does not need the support of the rule, that in such cases the public welfare should not be disregarded, yet I think, on that ground courts should so interpret the statute as to uphold the title of the

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state and its grantees if it can be done without violating the rules of law.

Judgment is ordered in favor of the plaintiff, with costs.

SUPREME COURT

ELIZA RAUH agt. THE BOARD OF COMMISSIONERS OF THE
DEPARTMENT OF PUBLIC PARKS.

New York (city of) Department of Parks — Is a subdivision of the city government — Not liable to be sued as a corporate entity — Complaint — Demurrer — When well taken.

The board of commissioners of the department of public parks, being only a subordinate division of the city government, are not liable to be sued as a corporate entity.

In an action against such commissioners a demurrer to the complaint should be sustained, notwithstanding an allegation that they are a domestic corporation.

Such allegation not being of a matter of fact, but a conclusion of law, the court will judicially take notice of the fact that the defendants constitute a part of the municipal government of this city and that their powers are defined and limited by the charter of the city and other public statutes in relation to that subject.

Special Term, February, 1884.

George P. Andrews and E. H. Lacombe, for defendants in support of the demurrer.

A. J. Rogers, for the plaintiff.

LAWRENCE, *J.*—The plaintiff alleges that the defendants are now and were at the time named in the complaint a domestic corporation; that she now is and has been since the 12th of February, 1876, the owner and possessor in fee of certain lands and premises in the complaint particularly described; that by an act of the legislature, passed in 1873, and amended in 1874, the defendants, by the name and

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description of the commissioners of the department of public parks of the city of New York, were given power and control exclusively over all the streets, roads and avenues in the twenty-third and twenty-fourth wards of the said city, to establish the width and grades of all such streets, roads and avenues, and for other purposes particularly described in said act; that the defendants claim that the house erected on the plaintiff's premises, is about two feet over the line of the North Third avenue, and that therefore the defendants threaten to pull the said house down and otherwise injure and demolish the same, and have begun to pull down, injure and demolish the same, and will tear down, injure and demolish the same, unless enjoined from so doing by the court, and thus cause the plaintiff to suffer great damage, loss and irreparable injury; that no proceedings have ever been taken by the defendants, of any kind or character, to appropriate to the city of New York on North Third avenue the said two feet of land or any part thereof, and that they have made no compensation to the plaintiff for taking the same, but threaten to pull down and demolish the said house solely and alone upon the ground that it extends about two feet into said street known as North Third avenue, as widened, without any proceeding or authority of law whatever.

To the complaint the defendants demur, on the ground that it does not state facts sufficient to constitute a cause of action. If the allegation in the complaint that the defendants are now, and were at the times in the complaint named, a domestic corporation, is an allegation of a matter of fact, it is clear that the demurrer cannot be sustained upon the ground principally argued by the defendants' counsel, to wit, that the defendants are not a corporation and that actions cannot be maintained against them, for the reason that the demurrer, according to old established principles, admits such facts as are properly pleaded. (*See United States agt. Ames, 99 U. S., 45, and cases cited.*)

It is equally well settled, however, that the demurrer only

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admits the facts that are relevant and well pleaded, but not conclusions of law (*See Kinnier agt. Kinnier*, 45 *N. Y.*, 539; *Dillon agt. Barnard*, 21 *Wall.*, 430). So, too, averments in a complaint as to the meaning or contents of a paper set forth therein, or annexed to and made part thereof, are not admitted by a demurrer (*Bonnell agt. Griswold*, 68 *N. Y.*, 294; *Buffalo Catholic Institute agt. Bitter*, 87 *N. Y.*, 250).

Now in this case, independently of the reference to the statute referred to in the complaint, which prescribes a portion of the duties of the defendants, this court must, I think judicially take notice of the fact that the defendants constitute a part of the municipal government of this city, and that their powers are defined and limited by the charter of the city and other public statutes in relation to that subject (*See Swinerton agt. Columbian Ins. Co.*, 37 *N. Y.*, 174-189).

If I am right in this assumption then it follows that the demurrer is well taken, for the reason that the admission of the allegation that the defendants are a domestic corporation is an admission only of the legal conclusion which the pleader who framed the complaint drew from the various statutes under which the defendants have their existence. In other words, I am of the opinion that as the defendants derived their powers from public statutes, of which the court can take judicial cognizance, the complaint is to be read in construing the allegation that the defendants are a domestic corporation in the same manner as if those statutes had been annexed thereto. If such statutes had been annexed the conclusion of the pleader as to their force and effect could have no greater efficacy than would an averment in the complaint as to the meaning or contents of a paper set forth therein, or annexed to or made a part thereof; and in such cases, as has already been seen, the courts have uniformly held that such averments are not admitted by a demurrer. Under the charter the park department is a mere subdivision of the city government and is not itself a body corporate (*See Swift agt. The Mayor of New York*, 83 *N. Y.*, 533).

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It is true that that case related to the police department, but the reasoning by which the result there attained was reached applies equally to all the other departments created by the charter (*See, also, New York Balance Dock Company agt. The Mayor*, 8 Hun, 247). In that case the general term of this department, in speaking of the department of public charities and correction, said: "They constitute only a branch of the city government and part of the municipality appointed by its officers with some independent powers, but in the main subservient to and under the supervision and control of the general government. They have no corporate rights; they can neither sue nor be sued."

No statute has been cited which gives to the board of commissioners of the department of public parks any greater corporate powers than those conferred upon the other departments of the city government. All the departments are but parts of the city corporation, which alone possesses corporate capacity (*See charter, chap. 335 of the Laws of 1873, and the acts amendatory thereof*). Entertaining these views I am of the opinion that the board of commissioners of the department of public parks are not liable to be sued as a corporate entity, and that therefore it is unnecessary to discuss any of the other questions presented in the case.

The defendants are entitled to judgment upon the demurrer, with costs.

SUPREME COURT.

THE PEOPLE agt. JOHN M. DEMPSEY and others.

Practice in criminal cases—Appeal—In what cases an appeal may be taken by the people—What orders in criminal cases reviewable by supreme court—Code of Criminal Procedure, section 518.

Formerly the people had no right or power to review a decision or judgment favorable to a prisoner. The right to do so depends upon statute. Under section 518 of the Code of Criminal Procedure an appeal to the supreme court can be taken by the people in two cases only: 1st. From

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a judgment for the prisoner on a demurrer to the indictment. 2d.

From an order of the court arresting judgment.

An order of the oyer and terminer setting aside a grand jury and quashing an indictment is not reviewable in the supreme court.

The general term of the supreme court can correct errors and mistakes in criminal cases only when brought before it pursuant to statute.

Third Department, General Term, January, 1884.

LEARNED, P. J., BOARDMAN and POTTER, JJ.

THE defendants were recognized to await the action of the grand jury to convene at the May term of the Albany oyer and terminer, 1882. At the first opportunity the defendants had, and before the grand jurors were sworn, they filed a paper signed by them protesting against the swearing in or recognition by the court as grand jurors, of the persons who had answered to their names, and who were assumed to be summoned to appear and act as grand jurors at that term, on the ground that they had not been drawn from a list of 300 persons prepared by the supervisors of the county of Albany, pursuant to the provisions of the Revised Statutes, but had been in fact drawn from the names in the petit jury box of said county, which box contained the names of upwards of 2,500 persons, under the provisions of chapter 532 of the Laws of 1881, which defendants insisted was unconstitutional as it affected Albany county only, and was therefore in violation of the constitutional provision which forbids the passage by the legislature of a private or local bill for selecting, drawing, summoning or impanneling grand jurors.

The district attorney objected to the filing of the paper, but admitted that the drawing was made in pursuance of said chapter 532 of the Laws of 1881. The court reserved its decision. On the coming in of the grand jury, and before arraignment, the defendants renewed their objections in a paper signed and submitted by them. The district attorney objected to its filing. He admitted, as before, that the drawing was made under said chapter 532 of the Laws of 1881. A

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motion was made to set aside and to quash the indictment for the reasons above stated. The questions raised were reserved for the purpose of hearing argument upon all of the matters. After argument and on August 6, 1883, the oyer and terminer decided in favor of the defendants, and an order was entered that as to these defendants "the grand jury impaneled at the opening of this court be and the same hereby is set aside, and the persons summoned to serve as grand jurors be and they hereby are discharged from service as such grand jurors, and the indictment against said John M. Dempsey, Thomas Ansbro and George F. Backman, found by such persons acting as such grand jurors, be and the same is hereby quashed. This order to take effect and to be deemed as made on the 1st day of May, 1882, at the opening of the court on that day, so far as the discharge of the persons summoned to act as grand jurors is concerned." The district attorney appealed to this court and the defendants moved to dismiss the appeal. The reasons assigned by the oyer and terminer for making said order are to be found in the case of *The People agt. Duff* (65 How. Pr. R., 365).

Edward J. Meegan, for defendants :

I. Antecedent to the Revised Statutes even the prisoner had no absolute right to have his conviction reviewed in a higher court. Judge EDMONDS, in *Carnal agt. The People* (1 Park. Crim. R., 268), states the rule at that time thus: "Prior to the Revised Statutes there was no bill of exceptions in criminal cases and writ of error thereon for the review of convictions in the oyer and terminer. The review was attained in this manner: The court suspended passing sentence and certified the question, which was in doubt, to the supreme court, who considered and passed upon it and advised the court below either to grant a new trial or proceed to pass sentence; and sometimes when the convict was before them they passed the sentence themselves. Whether the trial should be reviewed was at the option of the court before

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which it was had, and the prisoner had not the right as in civil cases to take exceptions and carry up the record for review" (*See, also, Ex parte Vermilyea*, 6 Cow., 555). The legislature, in the Revised Statutes, altered this practice and secured to the prisoner the right to a review of his case by writ of error (3 *R. S.* [6th ed.], 1030, *sec.* 26; *Id.*, 1037, *art.* 2; *Carnal agt. The People*, 1 *Park. Crim. R.*, 268).

II. The Revised Statutes did not authorize a writ of error in a criminal case on behalf of the people. A decision favorable to the prisoner was conclusive (*People agt. Corning*, 2 *N. Y.*, 9). The opinion of the court of appeals in the case cited was written by judge Bronson, and he, in his usual luminous style, formulates the reasons of the decision as follows: "The weight of authority seems to be against the right of the government to bring error in a criminal case. The absence of any precedent for it either here or in England until within a very recent period fully counterbalances, if it does not outweigh, the fact that the right has lately been exercised in a few instances without objection. And in three of the four states where the question has been made the courts have decided that the right does not exist. But this is not all. Many of the rules and maxims of our law are favorable instead of oppressive to persons charged with crime. We hold it better that the guilty should escape than that the innocent should suffer. The accused cannot be twice put in jeopardy for the same cause. He may sometimes have a new trial, but the people cannot (*The People agt. Comstock*, 8 *Wend.*, 549). He may take exceptions on the trial and have a review on bill of exceptions (2 *R. S.*, 736, *sec.* 21). But no such right is secured to the people; and what is quite material to the present inquiry, the right to bring a writ of error is given to the accused, while it is evident that the provisions does not extend to the people or those who carry on the prosecution (2 *R. S.*, 737, *art.* 1). The legislature has not only omitted to confer upon any public officer the power to bring error in a criminal case, but

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the omission is rendered the more significant by the fact that the attorney general has been specially authorized to bring error in civil cases (2 *R. S.*, 592, *sec.* 4). In addition to this, the powers and duties of the attorney general and district attorneys have been prescribed by the legislature (1 *R. S.*, 179, *art.* 5, *p.* 383, *art.* 7), and had it been intended that they should bring error in criminal cases, it is but reasonable to suppose that such power would have been included among those which have been conferred. It is made the duty of the district attorneys to attend certain courts of original jurisdiction in criminal cases, and conduct all prosecutions for crimes and offenses cognizable in such courts (1 *R. S.*, 383, *sec.* 89); but they are not required to do anything in the courts of appellate jurisdiction, except in cases where the defendant has taken a bill of exceptions, or brought a writ of error (2 *R. S.*, 736, *sec.* 27; *p.* 741, *sec.* 21). And finally district attorneys in this state do not hold a common law office; and they have no powers but such as can be found written in the statute book. I think it quite clear that neither they, nor any other public officer has been vested with authority to bring a writ of error in a criminal case." To avoid the effect of *People agt. Carnal* (*supra*), chapter 82 of the Laws of 1852 was enacted, which authorized a writ of error on behalf of the people to review any judgment rendered in favor of any defendant, except that of an acquittal by a jury. But this law was held not to apply to a judgment rendered prior to its passage (*People agt. Carnal*, 6 *N. Y.*, 463). A writ of error would not lie on behalf of the people at common law (*People agt. Bork*, 78 *N. Y.*, 348). Nor where the indictment was quashed (*People agt. Stone*, 9 *Wend.*, 191). And no writ of error was allowed unless within the express terms of the act of 1852, thus: 1. A writ of error was held not to lie to review a judgment on some of the counts in an indictment, while other counts are undisposed of (*People agt. Merrill*, 14 *N. Y.*, 74). 2. Again, a writ of error was held not to lie to review an order of the

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supreme court, granting a new trial in a criminal case where there had been a conviction and *certiorari*, with stay of judgment in the court below (*People agt. Nestle*, 19 N. Y., 583). (e.) Chapter 176 of the Laws of 1879 and chapter 538 of the Laws of 1880 further extended to the people the right of review, and authorized a writ of error to review a decision or order quashing an indictment. (f.) The decision of the highest court of this state, above quoted, announce the rule on behalf of the people in a criminal case, but subsequent legislation authorized a proceeding by a writ of error in certain cases to review decisions favorable to the prisoner. The abolition of writs of error, therefore, would take away the right of review on behalf of the people, and the people would occupy the same position that they were in prior to said subsequent legislation.

III. The appeal taken herein is to be governed by the Code of Criminal Procedure, and under its provisions the order entered in the oyer and terminer is not one from which an appeal can be taken to this court. (a.) Section 515 abolishes writs of error and *certiorari* as they theretofore existed, and provides that "hereafter the only mode of reviewing judgment or order in a criminal action is by appeal." (b.) Section 518 contains the only authority for an appeal by the people to the supreme court, in these words: "Sec. 518. An appeal to the supreme court may be taken by the people in the following cases and no other: 1. Upon a judgment for the defendant on a demurrer to the indictment. 2. Upon an order of the court arresting the judgment. (c.) This appeal is neither from a judgment sustaining or allowing a demurrer, nor an order of the court arresting the judgment. The Code authorizes a demurrer for certain defects which appear upon the face of the indictment (Sec. 323). There was no demurrer in this case. The Code further provides that "a motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant upon the plea of a former con-

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viction or acquittal" (*Sec. 467*). There was no plea of guilty in this case. There was no trial, and, therefore, a verdict of guilty was an impossibility, and the defendants never made any claim or plea of *autrefois acquit* or *autrefois convict*. (*d.*) The language of section 518 is prohibitory. It expressly forbids an appeal to the supreme court by the people, except in the two classes of cases enumerated. The supreme court is given no jurisdiction, and is inhibited by the words "and no other" from exercising any in a case like the present one. (*e.*) Sections 515 to 518 operate to repeal chapter 176 of the Laws of 1879 and chapter 538 of the Laws of 1880, and they are no longer authority for an appeal from an order quashing an indictment. (*f.*) The language of chief justice JOHNSON, in *People agt. Nestle* (19 *N. Y.*, 584), involving the construction of the act of 1852 aforesaid applies to this case. He says: "The case is plainly not provided for by the statute, the language of which is clear and precise. Technical words are employed which accurately exclude such cases as the present."

IV. The jurisdiction of the general term of the supreme court, in the review of criminal cases, is purely statutory. It possesses no right or power of supervision or control over the decisions of the court of oyer and terminer to correct alleged errors committed by it, except so far as the statute confers the power to do so. If any power exists in the general term of the supreme court to supervise the proceedings of the court of oyer and terminer, and it is respectfully submitted there is none, the district attorney, so far as this case is concerned, has selected his remedy. He has elected to attempt a review by appeal, and he must therefore stand or fall by the Code provisions regulating appeals. An order has been entered in the oyer and terminer, a court separate and distinct from the supreme court, and the Code has made no provision for reviewing it by appeal.

D. Cady Herrick, district attorney, for people.

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BOARDMAN, J.—The facts and orders in this case are the same as in the *People agt. Fitzpatrick*, decided at the last September general term. In the latter case we considered the merits and decided that the order setting aside and discharging the grand jury as to that defendant, and as to him quashing the indictment found, was erroneous, such order was therefore reversed.

Upon that occasion counsel on either side desired the court to pass upon the merits and no question was raised as to the validity of the appeal taken by the people from such order. That question was not, therefore, passed upon. This appeal by the people arises upon the same state of facts, but the defendants now move to dismiss it upon the ground that the people have no right to appeal in the present instance, and hence the court can acquire no jurisdiction.

Formerly people had no power to review an adverse decision (*People agt. Corning*, 2 N. Y., 9; *People agt. Comstock*, 8 Wend., 599). Afterwards, in 1852 (*chap. 82 Laws of 1852*), an act was passed giving the people the right to review judgments in favor of any defendant, except in case of acquittal by a jury.

In 1879 and 1880, such right of review was further extended in favor of the people. But a writ of error at common law would not lie on behalf of the people after a judgment of acquittal (*People agt. Corning*, *ut supra*; *People agt. Bork*, 78 N. Y., 346); nor from an order quashing an indictment (*People agt. Stone*, 9 Wend., 191).

But all these provisions have been abolished by the Code of Criminal Procedure (*sec. 515*), and now the only mode of reviewing a judgment or order in a criminal action is by appeal. No such mode of review ever existed before and so we must look to the Criminal Code for all authority or limitation of authority. Unless the Code gives to the people this right of appeal the appeal must be dismissed. By section 518 the people may appeal to the supreme court in two cases: First, from a judgment for defendant on demurrer to indictment;

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second, from an order arresting judgment; neither of which cover the present case. In no other case has the right of the people to appeal to the supreme court been given. The district attorney concedes that the right is not given by the Code of Criminal Procedure. The concession is fatal.

This court may correct errors and mistakes only when they can be brought before us pursuant to law. The court below, through ignorance or corruption, may rule against the people on questions of evidence, throughout a trial for murder whereby a criminal is acquitted, but this court cannot correct such errors. So, too, of the drawing of a panel of jurors in a criminal case, however gross the error and however fatal to justice the consequences may be, the action cannot be reviewed on behalf of the people. There is no precedent for an allowance of an appeal in criminal cases outside and independent of the statute. We are not prepared to make one in this case.

Happily we cannot believe any danger can arise from a willful disregard of the criminal laws or a corrupt purpose to thwart their due execution by judicial officers. The order in the case under consideration was made at the same time with the one in *Fitzpatrick's case*. Hence our decision in that case could not have been known to the learned judge, or aided in modifying his action in the present instance.

Nor can we believe that any judge, after the decision of the *Fitzpatrick case*, would, on the same facts, disregard that decision, even though that appeal was unauthorized by law. The question may be very easily determined by the court of last resort, as in the *Petrea case* (92 *N. Y.*, 128), by deciding such motions in accordance with our former opinion and leaving the defendant to test the correctness of the same.

For the reason stated, we think this appeal must be dismissed.

LEARNED, P. J., and POTTER, J., concur.

NOTE.—*People agt. Fitzpatrick*, referred to in the opinion of judge BOARDMAN, is reported *ante* 14. In that case counsel for the defendant waived the jurisdictional question and argued the case upon the merits.

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The court assumed jurisdiction and reversed the order appealed from, but in *People agt. Dempsey*, above reported, the same general term held that in a case like Fitzpatrick's they have no power to review.

Consent may give a court jurisdiction of parties to an action, but not of the subject matter (*Brady agt. Richardson*, 18 *Ind.*, 1; *Overstreet agt. Brown*, 4 *McCord* [S. C.], 79; *Campbell agt. Cowden*, *Wright* [Ohio], 484; *Cleveland agt. Welsh*, 4 *Mass.*, 593; *Harrison agt. Rowan*, *Pet. C. Ct.*, 489; *Walker agt. Rogan*, 1 *Wis.*, 597; *Hills agt. Miles*, 13 *Wis.*, 625; *Clyde agt. Parker*, 22 *Barb.*, 323).

Consent of parties cannot confer jurisdiction in a matter which is excluded by law. (*Bents agt. Graves*, 3 *McCord* [S. C.], 280; *Foley agt. The People*, 1 *Ill.* [Breese], 32; *McHenry agt. Wallen*, 2 *Yerg.* [Tenn.], 441; *Simpson agt. McMillion*, 1 *Nott & M.* [S. C.], 192; *Wells agt. Reynolds*, 1 *Tread.* [S. C.], *Const.*, 478; *Banks agt. Fowler*, 3 *Litt.* [Ky.], 332; *McCall agt. Peachy*, 1 *Cull.* [Va.], 55; *Brown agt. McKee*, 1 *J. J. Marsh.* [Ky.], 476; *Ormsby agt. Lynch*, 6 *Litt.* [Ky.], 303; *Lindsey agt. McClelland*, 1 *Bibb.* [Ky.], 263; *Little agt. Fitch*, 33 *Ata.*, 343; *Andrews agt. Wheaton*, 23 *Conn.*, 112; *Randolph Co. agt. Ralls*, 18 *Ill.*, 29).

The proceedings of any tribunal, not having jurisdiction of the subject matter which it professes to decide are void. (*Wicks agt. Cauld*, 5 *Har. & J.* [Md.], 42; *Griffith agt. Frazier*, 8 *Cranch*, 9; *Denn agt. Harnden*, 1 *Paine*, 55; *Collamer agt. Page*, 35 *Vt.*, 387; *Gormley agt. McIntosh*, 22 *Barb.*, 271; *Elliot agt. Piersoll*, 1 *Pet.*, 340; 1 *Bish. Crim. Pro.*, sec. 986.

WELLS, on jurisdiction of courts, lays down this rule: "Where there is no jurisdiction it does not belong to the proper functions of a court to give an opinion upon a matter submitted to them for the guidance of parties or inferior tribunals, even where the parties consent to it. The whole business of a court is confined to giving decisions in cases properly before it" (*P. 10*, sec. 13).—[ED.]

Macy agt. Sawyer.

SUPREME COURT.

CHARLES A. MACY, JR., executor, &c., agt. MARGARET SAWYER and others.

Will — Construction of — Life estate by implication — Power of sale — When inoperative.

To devise an estate by implication there must be such a strong probability of an intention to give one that the contrary cannot be supposed.

The gift by a testator to his widow of all the rents and income of his real estate during her life creates in her an estate in the realty itself. And where there are no duties charged upon the executors with respect to the collection of the rents or income of the real estate or its application, no estate or trust is created in them in respect thereto.

A power given to the executors to sell the real estate of the testator may be so hampered with restrictions as to be wholly inoperative and may be disregarded.

The gift of the rest and residue of the testator's estate to *his children, after the death of his wife*, raises a life estate therein by implication in the testator's wife.

Special Term, March, 1883.

THIS is an action for the construction of the last will and testament of John Lawyer, deceased. The testator died seized and possessed of property real and personal.

By the third clause of his will, the testator gave to his wife "during her natural life only, all the rent and interest accruing from the real estate" of which he died seized. The testator gave, after the death of his wife, portions of his real estate to his two sons, and to his daughter other portions thereof; he also gave to her \$1,000 in cash after the death of his wife. To the executors of his will was given a power to sell and convey his real estate, under certain restrictions, which were afterwards in the will declared as follows: "It is my desire that none of my real said estate be sold except in case of absolute necessity and for the benefit of my said estate; and it is my will that it shall not be sold but with the written consent of

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such of my heirs hereinbefore mentioned as may then be living, and that the amount realized upon such sale or sales shall be deposited in some safe savings bank or banks in trust of and for the benefit of the legatees, to whom the property so sold would have gone under the provisions of this will, and made payable to such parties after the death of my said wife, to whom the interest of such deposit shall go as long as she may live."

In the ninth clause of his will the testator declared as follows: "I give, devise and bequeath the rest and residue of my estate not hereinbefore mentioned, real as well as personal, after my said wife's death, to my said three children, share and share alike."

The questions which arose under the will, which were submitted for decision, were in substance, whether the will created a valid express trust as to all or any part of the real estate, and as to the duties and powers of the executors as to the real estate. Whether the widow of the testator was entitled to the gross rents or only the net rents, after paying taxes, repairs, &c. Whether the will created an implied discretion and trust in the executors to take charge of and hold all of the personal property, except what is specifically bequeathed, and to keep the same invested, and accumulate the interest and income thereof until the death of the widow.

Wilson M. Powell, for plaintiff.

Charles H. Glover, for defendants Sawyer and Clapp.

Washington Sackman, for defendant Temler.

VAN VORST, J. — There is no gift to the executors, in terms, of any estate in the realty. Nor is there any duty or trust imposed upon them with regard to its management. The gift is directly to the testator's wife of the rents and profits. Had the executor been invested with the duty of collecting and applying the rents and profits an estate therein,

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by implication, might be found to exist in them commensurate with the duration of the duty or trust imposed by the testator. But there is nothing in the will which indicates an intention on the part of the testator to create a trust in the executors, in the real estate or its rents and profits. They are not directed to collect or pay over the rents to the widow. To devise an estate by implication there must be such a strong probability of an intention to give one that the contrary cannot be supposed (*Post agt. Hover*, 33 *N. Y.*, 593, 599). But the gift to the testator's widow, of all the rents and profits, creates in her an estate for life. For a devise of the income, rents and profits of land, when there is nothing to qualify the gift, will convey the property itself to the devisee.

The executors, however, have a qualified power of sale, but the power is so limited by restrictions that it is practically inoperative, and as it can prove no convenience to the devisees or the estate it may be wholly disregarded, for the testator declares that none of the real estate shall be sold, except in case of absolute necessity and for the benefit of the estate, and then only upon the consent of his heirs, by whom he means the devisees thereof. This limitation refers exclusively to the exercise of the power intended to be given. As it appears that the testator owes no debts, or only to a trifling amount, and that there is an abundance of personalty to answer all testamentary charges, there would seem to be no occasion for the exercise of the power of sale, which could in no event be executed, the devisees not consenting.

The conclusion reached is, therefore, that the devisees take the real estate absolutely, subject only to the life estate in the widow, and that the life estate in their mother is the only restraint upon their absolute power of disposition of the realty. The ordinary annual taxes of all kind, and such repairs as prudence requires by way of keeping the buildings in good tenantable condition, is a charge upon the income and must thus be borne by the tenant for life.

I discover nothing in the seventh clause of the will creating

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a trust in the executors with regard to the proceeds of real estate, if any should under the restrictions suggested, be sold. Upon such contingency the proceeds are to be deposited in a savings bank, in trust for the benefit of the person to whom the same is devised, and the deposit should be made payable to such person, after the death of the widow, to whom the interest should meanwhile be paid.

All there is of this is, that in such event the savings bank would become the trustee and guardian of the fund, during the widows life, and that the remaindermen would be entitled to receive it from the bank upon her death. But such change of the reality into personality, when the low rate of interest paid by savings bank is considered, is highly improbable under any circumstances. But it is useless to speak farther of a power which is nominal only. All the testator's personal property, consisting of chattels and movables, with the exception of what is given to his sons by the fourth paragraph of the will, is given directly to his wife. But it appears that the testator owned other personal property not included under the above description, which is disposed of by the ninth clause of the will, in these words: "I give, devise and bequeath the rest and residue of my estate not hereinbefore mentioned, real as well as personal, after my said wife's death, to my said three children, share and share alike." With regard to the personal property disposed of by this gift, it appears to me clearly that the widow is entitled to the income thereof for life. That is implied by the gift to the children, of the principal, after her death. The fact that the children are excluded from the possession during their mothers life, is an indication that the testator designed the income for her, so long as she should live.

This subject is carefully considered by surrogate Bradford in *Doughty* agt. *Stillwell* (1 *Brad.*, 300, 310), as also in *Dale* agt. *Dale* (13 *Penn. St. R.*, 446).

The rule seems to be, that a gift to the testator's heir, after the death of A. confers on A. an estate for life by implication ;

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but a gift to B., a *stranger*, after the death of A., does no confer an estate on A. by implication (1 *Jur. on Wills* [5th ed., by Biglow], 533). Unless the income gave to the widow, through such implied bequest thereof, it would be undisposed of. There is no residuary clause into which it would drop.

It is clear that the testator did not mean to leave any part of his estate outside the operation of his will. The gift of \$1,000 to the daughter of the testator is not payable until after the death of the testator's wife. But doubtless with the consent of the tenant for life and others in interest it could be paid earlier. The above conclusions disposed of all the questions raised by counsel, and in accord therewith judgment must be entered for the construction of the will.

CITY COURT OF NEW YORK.

MARY A. BELL agt. CHARLES LESBINI.

Code of Civil Procedure, section 501 — Practice — Counter-claim, when not allowable.

A claim for the wrongful conversion of a chattel, which is a cause of action arising out of a tort, cannot be set up by way of a counter-claim in an action arising upon contract.

DEMURRER to counter-claim.

George L. Sterling, for demurrer.

Sidney H. Stuart, opposed.

BROWN, J.—Section 501 allows a counter-claim arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. The contract set forth in the complaint is alleged to have been made between plaintiff and defendant, whereby plaintiff agreed to furnish defendant with board and

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lodging at her house at the rate of thirty dollars per week; that he agreed to pay that sum therefor. That she furnished said board and lodging to defendant from June 23, 1883, to October 23, 1883. That under the agreement in question there became due to her \$525.75. That the defendant paid on account thereof \$262, leaving a balance due of \$263.75, to recover which the action is brought. The allegation of the answer demurred to, and which is set up as a separate defense and as a counter-claim to the cause of action, is that on the 23d day of October, 1883, the defendant was the owner and possessed of certain personal property of the value of \$1,000. That on said day plaintiff forcibly ejected defendant from the room mentioned in the complaint; took possession of said personal property and converted the same to her own use; and that by reason of said acts he has been damaged in the said sum of \$1,000. Thus the action is founded *ex contractu*, while the counter-claim is founded *ex delicto*. The demurrer is taken under the fourth subdivision of section 495 of the Code of Civil Procedure, on the ground that the counter-claim is not of the character specified in section 501 of the Code. I think the demurrer is well taken. The subject matter of the counter-claim is the tortious act of the plaintiff in wrongfully taking and converting to her own use the property of the defendant, of the value of \$1,000. While the plaintiff, on the other hand, sets forth an express contract, upon which a fixed and certain sum was due to her, and which she was entitled to receive on the 23d day of October, 1883, the pleadings do not suggest anything connected with that particular transaction which was open, undetermined or to be done before the plaintiff was entitled to receive the money claimed to be due from the defendant. There is no claim or suggestion anywhere that defendant was entitled to remain longer in the premises, nor that plaintiff had not the right to the possession of her rooms upon that day, nor the right to refuse to continue furnishing defendant with board and lodging. I have been unable to find a single case in which a clear case of tort, not

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arising out of the transaction mentioned in the complaint, has been allowed to stand in opposition to a recovery upon a contract. That it cannot be set up has been decided in several cases (*See Piser agt. Stearns*, 1 *Hilt.*, 86; *Chambers agt. Lewis*, 11 *Abb.*, 210). There are some cases in which the doctrine might be said to be allowed to prevail to the extent of permitting a party to waive the tort and recover as upon an implied contract. An examination of those cases will disclose the fact that there existed a conventional relation between the parties, *i. e.*, as an agent who collects money for his principal and refuses to pay over (*Colt agt. Stewart*, 12 *Abb.* [*N. S.*], 216). That the counter-claim is purely to recover for the value of the property converted is not open to dispute. It cannot have relation to the contract for the rooms and board, and no part of the sum is claimed to be for damages for the ejection from the rooms. As before stated, he does not claim he had a right to the possession thereof upon or beyond the day mentioned. The sum claimed being simply for the value of the property converted, the demurrer is sustained.

SUPREME COURT.

MATTHEW HALE and ALPHEUS T. BULKLEY agt. JOHN SWINBURNE.

NO. 1.

Complaint — Answer — When answer frivolous — When motion for judgment on the ground of the frivolousness of the answer will be granted — Stay of proceedings — When should not be granted pending an appeal from an order of the special term adjudging an answer frivolous, but allowing the service of an amended answer.

The action was brought to recover for professional services rendered by the plaintiffs, as attorneys and counsel, in conducting certain actions and proceedings instituted by the defendant to obtain the possession of the office of mayor of the city of Albany, and which services were

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charged in the complaint to have been rendered upon the retainer and request of the defendant. The answer failed to take issue squarely upon this allegation, but sought to evade it by alleging that the service was not performed for the defendant any more than for any other citizen of Albany:

Held, that the answer might be literally true, and yet there is no defense stated because the retainer and employment by the defendant to perform the services is undenied, and for this reason the answer is frivolous and the plaintiff is entitled to judgment on account of the frivolousness of the answer, unless the defendant serves an amended answer within ten days and pays ten dollars costs of motion.

On a motion by defendant for a stay of proceedings pending an appeal to the general term from this order:

Held, that the motion should be denied unless the defendant gives security for the payment of the recovery in the action, if he fails upon his appeal from the order.

MOTION for judgment against the defendant on the ground of the frivolousness of the answer.

Hale & Bulkley, in person, for motion.

Smith, Moak & Buchanan, opposed.

WESTBROOK, J.—The answer of the defendant is bad: First. The complaint avers that “the defendant retained the * * * plaintiffs as his attorneys and counsel, and requested the plaintiff Matthew Hale to take charge of various civil and criminal proceedings, * * * and that the plaintiffs, on the retainer and request of the defendant, rendered and performed professional services as counsel for defendant.” It will be observed that the ground of liability stated is the retainer and request by the defendant to perform the service, and because of such retainer and request the services are charged to have been “for the defendant,” *i. e.*, at his request. The denial in the answer is not of the retainer and request to perform the service, but of a retainer and request to do it “for him,” *i. e.* (as the answer is careful to explain), for his benefit, because such service “was performed * * * as much for the benefit of the public as for the

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defendant." The denial and averment of the answer may be true, and yet the defendant be liable, because he retained and employed the plaintiffs to do the service. Second. It is probably true, as the answer avers, that the defendant is ignorant of "how much time" the plaintiffs devoted to the services averred in the complaint, and of "how much they may have expended," but this is not a denial of the allegations of the complaint that "between the 12th day of April, 1882, and the 1st day of July, 1883," the plaintiff Mathew Hale * * * devoted a large portion of his time "to the service charged in the complaint, and that in performing such service he expended divers sums, amounting in the aggregate to the amount of eighty-nine dollars and seventy-three cents and upwards." Third. The complaint, after averring that the services rendered were of the value of \$4,000, alleges "that the sum of \$3,825.23 is now justly due and payable from the defendant to the plaintiffs by reason of the premises." These allegations are not put in issue for the defendant is careful to maintain his evasion of a denial of his personal liability growing out of his retainer and employment by the statement, again repeated, that the services were not "for him more than any others of the public," and that consequently they were not "to him of the value of \$4,000, or any other sum whatever." The distinct allegation of the complaint "that the sum of \$3,825.23 is now justly due and payable from the defendant to the plaintiff" for services rendered upon his retainer and request is entirely undenied, and because undenied is not put in issue by an allegation that others were interested in the service as well as the defendant, and that consequently such services were of no pecuniary value to him. Admitting, for the sake of argument (though the admission is violent), that the defendant had no more personal interest in litigations, which had for their object the placing of the defendant in the possession of the office of mayor of the city of Albany, than "one of the public," yet it is true that an individual who employs another to perform labor is personally liable for

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the value thereof, even though the person contracting for the labor was not to be benefited thereby.

For these reasons the motion for judgment on account of the frivolousness of the answer must be granted, with ten dollars costs of motion, unless the defendant serves an amended answer in ten days and pays ten dollars costs of motion.

No. 2.

A motion was made by defendant for a stay of proceedings pending an appeal from the order of the special term to the general term by the defendant, which adjudged the answer frivolous, but allowed the service of an amended answer.

C. J. Buchanan, for motion.

Matthew Hale, opposed.

WESTBROOK, *J.* — The order appealed from deprived the defendant of no substantial right. The action was brought to recover for professional services rendered by the plaintiffs as attorneys and counsel in conducting the actions and proceedings instituted by the defendant to obtain the possession of the office of mayor of the city of Albany, and which services were charged in the complaint to have been rendered upon the retainer and request of the defendant.

The answer failed to take issue squarely upon this allegation, but sought to evade it by alleging that the service was not performed for the defendant, any more than for any other citizen of Albany. The answer might be literally true, and yet there was no defense stated, because the retainer and employment by the defendant to perform the services was undenied. For this reason the answer was held frivolous, but the defendant was allowed to serve a new answer on the payment of ten dollars costs.

It is impossible to read the pleadings, and the affidavits presented by the plaintiffs in opposition to this motion, which show clearly by the testimony of disinterested persons the

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retainer of the plaintiffs by the defendant, and the precarious character, to say the least, of the defendant's financial standing, without reaching the conclusion that the stay, which would delay the collection of an alleged debt for several months, ought not to be granted, except upon terms. By paying the ten dollars, and serving an amended answer, the defendant will be protected from a judgment pending his appeal in which, if he succeeds, full restoration can be made to him. If, on the other hand, the stay is granted, the plaintiffs are delayed for several months, and their claim jeopardized.

The stay asked for is therefore denied, unless the defendant gives security for the payment of the recovery in the action, if he fails upon his appeal from the order adjudging the answer frivolous.

SUPREME COURT.

DAVID A. THOMPSON, receiver, &c., of SAMUEL L. EISNER, agt. SAMUEL B. HEIDENRICH, SAMUEL L. EISNER, individually and as executors under the will of HENRY EISNER, deceased, and others.

Place of trial of an action establishing an interest in real property — Code of Civil Procedure, section 982 — What actions are within it — Code of Civil Procedure, sections 986, 783 — Power of the court under section 783 to relieve from non-compliance with section 986.

The plaintiff in his character as receiver not only seeks to recover the interest of S. E. in the estate of his father, which consists of both real and personal property situate in the city of New York, but also that a certain assignment executed by S. E. to H., which released an interest in such estate of said H. E., deceased, comprising real as well as personal property derived by S. E. under and by virtue of the will of his father. On motion to change place of trial:

Held. that the action is within that portion of section 982 of the Code of Civil Procedure, which is as follows: "And every other action to recover or procure a judgment establishing, determining, defining, for-

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feiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real."

Where the defendants made a proper demand that the place of trial be changed to the city and county of New York, pursuant to section 983 of the Code of Civil Procedure, but omitted to serve a notice of motion upon the plaintiff's attorney within the ten days prescribed by such section:

Held, that under section 783 the court has power and will, in a proper case, relieve the defendant from the charge of laches in not serving notice of motion as required by section 986.

Albany Special Term, November, 1883.

THIS is a motion by the defendant Heidenrich to change the place of trial in the above action from the county of Albany to the city and county of New York, upon the ground that said action affects real estate situate in the city of New York, and is therefore local.

S. W. Rosendale, for the motion.

L. G. Hun, opposed.

INGALLS, *J.*—This action is instituted by the plaintiff, as receiver, to reach the property of the defendant Samuel L. Eisner, and to cause the same to be applied in satisfaction of the judgments mentioned in the complaint.

The plaintiff alleges, among other things, in his complaint, in substance, that the said Samuel L. Eisner had acquired an interest in the estate of his father Henry Eisner, deceased, consisting of real and personal estate situated in the city of New York, under the provisions of the will of his said father; that Samuel L. Eisner, by an instrument in writing, transferred to the defendant Samuel B. Heidenrich all of the interest of the former in and to the estate of his father, and that such transfer was made in fraud of the rights of the creditors of said Samuel L. Eisner.

The plaintiff, in his complaint, demands that the assignment executed by the said Eisner and the said Heidenrich be set aside and vacated and declared to be null and void; and

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that the plaintiff, as such receiver, be adjudged and declared *to be the owner of and entitled* to receive and hold so much of the right, title and interest acquired by the said Samuel L. Eisner under and by virtue of the will of his deceased father Henry Eisner, as shall be sufficient to satisfy and discharge the claims of the creditors represented by him, together with interest and all necessary and proper costs and disbursements; and that the executors of the said Henry Eisner be ordered and directed *to recognize and acknowledge his title thereto and his right to receive and hold the same*, and to pay and transfer the same, or such portions thereof as are now due and arising, to him forthwith, and in case it shall be determined that the said Heidenrich purchased the aforesaid interest in good faith, and without notice of the latter's fraudulent intention, for a valuable consideration, that then the said transfer and assignment shall be held to be valid and effectual only to the extent of the consideration so actually advanced and furnished by the said Heidenrich; *and all the rest, residue and remainder of the interest of the said Eisner in the estate of his deceased father shall be adjudged to belong to the plaintiff,*" &c. Thus we perceive that the plaintiff, in his character as receiver, not only seeks to recover the interest of Samuel L. Eisner in the estate of his father, which consists of both real and personal property, but also that the assignment executed by Samuel L. Eisner to Heidenrich, which released an interest in such estate of said Henry Eisner, deceased, comprising real as well as personal property derived by said Samuel L. Eisner under and by virtue of the will of his father.

It seems very clear to my mind, considering the facts stated in the complaint and the relief therein claimed, that the action is within that portion of section 982 of the Code which is as follows: "And every other action to recover or procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise *affecting an estate, right, title, lien or other interest in real property or a chattel real.*"

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The section referred to is very comprehensive in respect to the language employed, and, so far as I have been able to discover, the courts have not evinced a disposition to restrict its meaning or effect (*Knickerbocker L. Ins. Co. agt. Clark*, 22 *Hun*, 506; *Fleise agt. Buckley*, 22 *Hun*, 551; *Bush agt. Treudwell*, 11 *Abb.* [*N. S.*], 27; *Leland agt. Hathorn*, 42 *N. Y.*, 547; *Wood agt. Hollister*, 3 *Abb.*, 14; *Starks, Receiver, agt. Bates*, 12 *How.*, 465).

The defendants made a proper demand that the place of trial be changed to the city and county of New York, pursuant to section 986 of the Code, but omitted to serve a notice of motion upon the plaintiff's attorney within the ten days prescribed by such section. I am convinced that the attorneys for the defendant Heidenrich have reasonably excused their failure to serve notice of motion, and should therefore be relieved from the charge of laches, provided the court is authorized to grant that relief, and it seems to me that section 783 of the Code confers ample authority for that purpose. The place of trial must therefore be changed to the city and county of New York, but without prejudice to a motion by the plaintiff to change the place of trial to any other county for convenience of witnesses (*Veeder agt. Baker*, 83 *N. Y.*, 157; *Park agt. Carnley*, 7 *How. Pr.*, 355; *International L. Ins. Co. agt. Southard*, 14 *Abb.*, 240).

No costs and allowance upon this motion.

The clerk of Albany county is authorized to enter an order in accordance with the foregoing.

Schachne *et al.* agt. Kayser.

SUPREME COURT.

LOUIS SCHACHNE *et al.* agt. LOUIS KAYSER.

Practice — Order of arrest — When motion to vacate will not be granted on the ground that Rule 25 has not been complied with by stating in the affidavits that no previous application had been made for such order — Code of Civil Procedure, section 568.

Although a motion may be made to vacate an order of arrest on the ground that the affidavits on which the order was granted did not state, as required by Rule 25, whether any previous application had been made for such order, such motion should be made with diligence. It is not intended in reserving the right of the party arrested to move to vacate the order at any time before final judgment, to include the right to so move for a failure to comply with Rule 25. It is too late to make such motion after the action is ready for trial.

Niagara Special Term, February, 1884.

On December 26, 1883, plaintiff and others brought suit in the supreme court against defendant and procured an order of arrest. Answer was served on January 7, 1884, and the case noticed for trial on January 19, 1884, by both parties. On January 26, 1884, defendant moved to vacate the order of arrest on the ground that the affidavits on which the order was granted did not state whether any previous application had been made for such order, as required by Rule 25 of the supreme court; the plaintiffs claiming the motion ought to have been made before the defendant had taken any other steps in the case. The defendant claimed that the motion could be made at any time before final judgment, as provided by section 568 of the Code of Civil Procedure.

John E. Pound, for motion.

William C. Greene, opposed.

DANIELS, *J.* — The provisions of the Code prescribing what shall be done to obtain an order of arrest, do not require that the requirements of Rule 25 shall be complied with

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by the applicant, for the reason it could not have been intended in reserving the right of the party arrested to move to vacate the order at any time before final judgment, to include the right so to move for a failure to comply with Rule 25. The provisions by being made a part of the Code must, on the contrary, have been intended to reserve that right for a failure to comply with its other provisions and is a portion of the statutory system, deemed as a remedy to the party arrested, when that has been done without complying with what the Code has required, to entitle the party to the order. It does not result from this construction that a like motion cannot be made for failing to comply with Rule 25. But it does follow that the failure is merely an irregularity, and while the defendant may move to vacate the order as irregularly made, on account of this omission, that should be done with diligence, as the parties are required to move to set aside other proceedings irregularly taken. This motion has not been so made. It has been delayed until the action is ready for trial, and the defendant has not been injured by the irregularity. It was an omission, depriving him of no right or privilege, and probably resulted from a mere oversight. The order under the facts should not be set aside. But the motion should be denied, with costs.

SUPREME COURT.

HENRY C. HARVEY and ANDREW SAULPAUGH, appellants, agt.
GEORGE VAN DYKE, respondent.

Justices' courts — Manner of reversing justice's judgment — When appellant may demand new trial in appellate court — Practice — Code of Civil Procedure, section 3068.

It is not in every case where the defendant demands in his answer judgment in his favor exceeding fifty dollars that he, as appellant, may demand and have a new trial in the appellate court, but only in those cases where from the nature of the action and the condition of the

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pleading it can be seen that the demand has some basis in fact or law in its support.

An improper pleading cannot be made the basis of a demand for a new trial in the county court, under the Code, applicable to appeals from judgments rendered by justices of the peace.

Where an action was brought in a justice's court in trover for taking and converting a cow, and damages were claimed in the sum of fifty dollars, the defendant answered by general denial, also set up property in himself, demanded judgment for the dismissal of the complaint and for seventy-five dollars damages, &c. Judgment was rendered in favor of plaintiffs for forty-four dollars and twelve cents. The defendant in his notice of appeal to the county court demanded a new trial in that court. The justice's return having been filed the plaintiffs moved thereon for an order transferring the case to the law calendar, and that it be heard on the justice's return without a new trial therein, which motion was denied:

Held, that the practice was correct. It was proper to determine in advance whether the appeal was to be tried on a question of fact or one of law. The county court had jurisdiction to determine that question, and it could do it as well on special motion as at opening of trial.

Third Department, General Term, July, 1883.

Before LEARNED, P. J., BOARDMAN and BOCKES, JJ.

Harver & Cochrane, for appellants.

Andrews & Edwards, for respondents.

BOCKES, J. — Appeal from an order of the county court of Columbia county, denying a motion for an order transferring the case to the law calendar of that court and that it be heard on the justice's return without a new trial therein. The action was commenced in justice's court where judgment was rendered in favor of the plaintiffs for thirty-five dollars, with nine dollars and twelve cents costs, in all forty-four dollars and twelve cents. The action was in trespass (or trover) for taking and converting a cow, and damages were claimed in the sum of fifty dollars. The defendant answered by general denial; also set up property in himself, demanded judgment for the dismissal of the complaint and for seventy-

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five dollars damages with costs of suit. Such were the pleadings. The defendant in his notice of appeal to the county court demanded a new trial in that court. The justice made full return of the proceedings before him with the evidence given on the trial, from which it appeared that but one witness was sworn. The defendant offered no proof in his own behalf, save, perhaps, what came in on the cross-examination of the plaintiffs' witness. The justice's return having been filed the plaintiffs moved thereon for an order as above stated, which motion was denied. We are of the opinion that no change has been made by the Code of Civil Procedure in the law applicable to the question here presented. The provisions of the present Code are substantially and in effect the same as those contained in the former Code. There is a trifling change in the language, none however, as we think, which can be deemed to make a change in the practice to be observed in cases of appeals to the county courts from judgments rendered by justices of the peace. The decisions therefore, under the former Code, on the question here presented, are of controlling significance. This being so the question is hardly an open one. This case is like *Johnson* agt. *Dow* (reported in *Albany Law Journal*, vol. 2, p. 228), on the point material to its decision. The purport of that decision is to the effect that it is not in every case where the defendant in his answer demands judgment in his favor exceeding fifty dollars, that he, as appellant, may demand and have a new trial in the appellate court, but only in those cases where from the nature of the action and the condition of the pleading it can be seen that the demand has some basis in fact or law in its support. To the same effect is the decision in *Houghton* agt. *Kenyon* (38 How., 107), a county court decision, but cited with approval in *Dunison* agt. *Trimmer* (27 Hun, 393), a case decided in this court at general term. Reference should also be had to *Mattison* agt. *Hall* (64 How., 515), as bearing on the case in hand. The import of the cases cited is to the effect that an improper

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pleading cannot be made the basis of a demand for a new trial in the county court under the provisions of the Code applicable to appeals from judgments rendered by justices of the peace. We are not prepared to overrule those cases. Recognize them as authoritative, and the motion below should have been granted.

It is urged that the order made in this case is not applicable, inasmuch as the motion was out of place and unnecessary. That the ruling sought for was properly attainable when the case should be regularly reached on the calendar, under a notice of argument. The precedent is against this position (*See Houghton agt. Kenyon, and Johnson agt. Dow, above cited*). It would seem also to be proper and right with a view to the saving of expense in preparing for trial, if no trial could be had, that the question should be settled in advance. The course of practice adopted in the cases last cited we think commendable. As regards the costs of the motion, probably none would be allowed by the county court in case it was not opposed. If opposed, the prevailing party should in general have costs.

Order appealed from reversed, with ten dollars costs and expenses for printing, and motion granted, with ten dollars costs of motion.

LEARNED, *P. J. (dissenting)*.—I think the appeal should be dismissed. Plaintiff moved, first, to deny a new trial; second, to transfer the cause to a law calendar; third, that the appeal be argued on the return. The county court denied motion. As to the second, we have nothing to do with the calendar. As to the first, the court only refused to deny a new trial. As to the third, the court refused the motion that the appeal be argued on the return. All of this is merely preliminary. The question presented will properly come up when the defendant attempts to try the case with new evidence. The county court was not obliged to decide the matter beforehand, and properly refused to decide. Plaintiffs

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can move the appeal when reached, and then the court will act. This motion is only asking the county court what it proposes to do at some future time.

BOARDMAN, *J.*—I concur in brother BOCKES' opinion. It was proper to determine in advance whether the appeal was to be tried on a question of fact or one of law. The county court had jurisdiction to determine that question, and it could do it as well on special motion as at opening of trial. The practice of plaintiffs was the best.

N. Y. SUPERIOR COURT.

HENRY NAYLOR, respondent, agt. BARENT H. LANE, appellant.

Attorney's lien — When costs only are awarded, attorney need not give notice of lien — Set-off — will not be allowed which defeats attorney's lien.

The lien of an attorney on a judgment recovered for the amount of his costs, &c., is well settled and has been regarded as an equitable assignment of the judgment to him.

Where costs only are awarded to protect his rights he is not bound to give notice of lien. But where, as in this case, notice was given, no settlement of the litigations between the parties themselves by set-off or otherwise will be allowed which defeats the lien of the attorney.

General Term, February, 1884.

APPEAL from an order granting a motion to offset judgments.

Oswald P. Backus, for appellant :

I. Argued that the verbal agreement between the defendant and his attorney, that all costs recovered in the action should belong to the attorney operated as an assignment of the costs to accrue, and the right to a set-off did not exist (*Perry* agt. *Chester*, 53 *N. Y.*, 250; *Prouty* agt. *Swift*, 10 *Hun*, 232;

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Firmenich agt. *Bovee*, 1 *Hun*, 532; *Ely* agt. *Cook*, 28 *N. Y.*, 365).

II. On motion a set-off will never be granted where it has the effect to deprive the attorney of his costs (*Prouty* agt. *Swift*, 10 *Hun*, 232; *Martin* agt. *Krouse*, 17 *How.*, 146; *Smith* agt. *Lowden*, 1 *Sandf.*, 696; *Hovey* agt. *Rubber, &c.*, 14 *Abb.* [*N. S.*], 66; *Dunkin* agt. *Vandenburgh*, 1 *Paige*, 622; 28 *N. Y.*, 237; 18 *N. Y.*, 360; 51 *N. Y.*, 140; 53 *N. Y.*, 243).

III. The statute of set-offs having been repealed, section 66 of the Code may be invoked to uphold an attorney's lien in an action or on motion (*Ennis* agt. *Curry*, 22 *Hun*, 284; 61 *How.*, 1).

Charles E. Crowell, for respondent:

I. The lien of an attorney is subject to the equitable right of set-off between the parties (*Sanders* agt. *Gillett*, 8 *Daly*, 183). The defendant is insolvent and the right of set-off must follow. The equities of the plaintiff are paramount to any others (*Davidson* agt. *Alford*, 80 *N. Y.*, 660; *Smith* agt. *Felton*, 43 *N. Y.*, 419).

II. It does not appear that the party defendant prior to verdict assigned his claim which might accrue for costs to his attorney, therefore the set-off is proper (*Garner* agt. *Gladwin*, 12 *Weekly Dig.*, 10). If an assignment had been made it would have been subject to all equities existing (*Chamberlain* agt. *Day*, 3 *Cow.*, 353; *Utica Ins. Company* agt. *Power*, 3 *Paige*, 365).

III. An attorney trusts to the responsibility of his client, and that his lien is subordinate to the equities existing between the parties (*Orafin* agt. *Tavis*, 1 *How.*, 517; *Nixon* agt. *Gregory*, 5 *How.*, 339; *Brooks* agt. *Hanford*, 15 *Abb. Pr.*, 342). Equity will permit a debt not yet due to be set off where there are circumstances which would render it inequitable to deny it (*Jordan* agt. *National Shoe and Leather Bank*, 74 *N. Y.*, 467). The claim to set off one judgment against

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another is a matter of equitable cognizance (*Stilwell* agt. *Carpenter*, 2 *Abb. N. C.*, 238, 269; *Shipman*, *Assignee*, agt. *Lansing et al.*, 25 *Hun*, 290).

O'GORMAN, *J.* — This action was tried and a verdict rendered for the defendant, and judgment duly entered thereon for the sum of \$180.63, the same being for costs and disbursements, on June 19, 1883. On the same day D. A. Hulett, the attorney for the defendant Lane, served on the attorney of the plaintiff notice of entry of said judgment, together with a notice of his own lien on said judgment, to the full extent thereof, for his taxed costs, &c. On the same day, and before entry of said judgment in favor of the defendant Lane, a judgment was entered in this court in another action, in favor of the plaintiff herein, for \$331.64, against said Lane and James A. Bills, on a joint and several indebtedness to said plaintiff. Nothing has been paid on either of these judgments.

A motion was made at special term on the part of said Naylor, the plaintiff in both of said actions, that the judgment obtained by the said defendant Lane against said Naylor in the first mentioned action, should be set off against the judgments obtained by the said Naylor in the action secondly above mentioned, by reducing the amount of the said judgment against Lane, and that the judgment in favor of said Lane and against the plaintiff should be canceled and satisfied of record. In opposition to the motion, an affidavit of said Hulett, attorney of said Lane, was read, setting forth that he had been the attorney for said Lane in said action, in which judgment had been recovered in favor of said Lane and against the plaintiff Naylor. That he has not been paid for his professional services in said action by said Lane, and believes that he will not be paid by him. That from the time of his employment by said Lane there had been an agreement with Lane that all costs recovered in the action should belong to him, Hulett, and not to the defendant. The learned judge

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at special term granted the said motion to set off, and the defendant Lane has appealed.

It seems to me that the appeal must be sustained. The effect of setting off one judgment against the other in this case is, that the amount of the judgment in favor of defendant Lane for costs, has been paid by the plaintiff to Lane, whereas it did not belong to Lane, but to Lane's attorney, as taxed costs in the action, and by special agreement with Lane, of which the plaintiff had notice. The lien of the attorney on a judgment recovered for the amount of his costs, &c., is well settled, and has sometimes been regarded as an equitable assignment of the judgment to him (*Marshall* agt. *Meech*, 51 *N. Y.*, 143; *Demmick* agt. *Cooley*, 3 *Civ. Pro. R.*, 146; *Coughlin* agt. *N. Y. Cent. R. R.*, 71 *N. Y.*, 443; *Wright* agt. *Wright*, 70 *N. Y.*, 96).

To protect the attorney's lien in the case at bar there was no necessity that notice should have been served on the plaintiff (*Molouchney* agt. *Kavanagh*, 3 *Civ. Pro. R.*, 255). Notice in this case, however, was given, and no settlement of the litigation between the parties themselves by set-off or otherwise, which defeated the lien of the attorney, was proper. (*In re Bailey*, 4 *Civ. Pro. R.*, 143; *Sanders* agt. *Gillett*, 8 *Dailey*, 184, and *Garner* agt. *Gladwin*, 12 *Weekly Digest*, 10). The cases cited in the argument below seem to me to differ in their essential elements from the case at bar, and are not controlling. The order appealed from should be reversed, and the motion denied, with ten dollars costs.

SEDGWICK, *Ch. J.*—I concur (*Citing Perry* agt. *Chester*, 53 *N. Y.*, 250).

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CITY COURT OF NEW YORK.

J. PRENTISS TUCKERMAN agt. DONALD R. CORBIN.

Counter-claim—Defendant not allowed to plead the same counter-claim to three independent actions brought by same plaintiff—Plaintiff may in his reply in second and third actions plead in abatement that counter-claim has been pleaded in first action—Defendant should protect himself by moving to consolidate or stay the second and third actions.

A party who has brought an action is not precluded from setting up the same matter as a counter-claim in a cross action, but will be compelled to elect between his own suit and the recoupment claimed, and if he elects the latter, his own suit will be stayed. But the rule does not extend so far as to allow a defendant to plead the same counter-claim to three independent actions brought by the same plaintiff. After using the counter-claim in the first action, the plaintiff may, in his reply, in the second and third actions, plead in abatement the fact that such counter-claim has been pleaded in the first action.

The defendant should have protected himself by moving to consolidate the actions or to stay the second and third actions until the first action was disposed of.

Trial Term, February, 1884.

TRIAL by the court without a jury.

E. P. Wilder, for plaintiff.

Rockwell & Pearson, for defendant.

McADAM, C. J.—Upon the trial of this action the following facts were conceded :

1. That prior to the commencement of this action the plaintiff commenced suit upon a promissory note made by the defendant and payable to the plaintiff's order, and to that suit the defendant pleaded a counter-claim against the plaintiff amounting to the sum of \$5,500.

2. That under the statute applicable to this court, the counter-claim pleaded, if recoverable at all, is recoverable in

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that action "without respect to the amount thereof" (*Code, sec. 3174*).

3. That the present action is upon a promissory note of like tenor and import, which became due one month after the maturity of the note embraced in said first action.

4. That the counter-claim pleaded in this suit is the same one pleaded in said former action.

Upon these admissions I decide, as matter of law, that the defendant having elected to interpose the counter-claim to said first action, can recover all the relief he is entitled to therein and is concluded by his election. And assuming, as I do for the purposes of this trial (but for no other purpose), that the counter-claim is a valid one, such election prevents the defendant from prosecuting the same counter-claim in the present action, for several reasons:

1. In said first action the defendant may recover his entire counter-claim, and in that way not only extinguish the plaintiff's cause of action therein, but recover a judgment for the excess, whatever it may be proved to be (*See Gleason agt. Muen, 2 Duer, 643; Davidson agt. Remington, 12 How. Pr., 310*).

2. Such counter-claim, although growing out of the original cause of action, might, at the option of the defendant, have been made the subject of an independent cause of action, and he cannot have two actions pending at the same time for the same cause, the pendency of one being a good plea in abatement to the other.

3. A counter-claim is in the nature of a cross action, and two actions for the same cause cannot be pending at the same time.

4. Whatever judgment is rendered in said first action determines the rights of the parties thereto (*Hatch agt. Benton, 6 Barb., 28; Miller agt. Freeburn, 4 Robt., 608; Davidson agt. Alfaro, 6 Weekly Dig., 455; Jones agt. McGee, 7 id., 97*), and such issues cannot be twice tried with the possible chance of a double recovery for the same cause, or a defeat on one trial and a recovery on the other.

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In the examination of this question, the point presented must not be confounded with one which might have arisen if the plaintiff had been the assignee of a cause of action, and the counter-claim had been available only to the extent of the demand which the plaintiff was prosecuting, nor (2) with the question which might have arisen if the defendant had first sued the plaintiff, and the latter had then brought an independent suit upon his claim to which the defendant had interposed the subject-matter of his action as a counter-claim, for in each of the two last named cases a different question of practice would have arisen (*Fabricotti* agt. *Lannitz*, 3 *Sand.*, 743; *Wilstee* agt. *Northam*, 3 *Bosw.*, 163; *Fuller* agt. *Read*, 15 *How. Pr.*, 236; *Harris* agt. *Hammond*, 18 *id.*, 123; *Naylor* agt. *Schenck*, 3 *E. D. Smith*, 135).

If the defendant, after pleading his counter-claim in the former action, had pleaded the same facts as a defense, instead of a counter-claim to this action, a different question might have arisen, although it has been said that if a defendant elects to recoup, and thus obtain the allowance of part of his claim, he cannot thereafter maintain a cross action for the remainder (*Britton* agt. *Turner*, 6 *N. H.*, 481).

But the defendant is bound by his own definition of the answer, and cannot at his own volition change the nature of the pleading which he has characterized and by so doing mislead the plaintiff (*Equitable Life Insurance Society* agt. *Cuyler*, 75 *N. Y.*, 515). He cannot now call that a defense which he has deliberately designated as a counter-claim. According to the rules of pleading, a defense is one thing and a counter-claim another. Matter pleaded may be good as a defense and not as a counter-claim, and *vice versa*. A counter-claim, if not demurred to, requires a reply. If matter be set up as a counter-claim, and the plaintiff demurs to it for insufficiency, it is no answer to the demurrer to say that although bad as a counter-claim it is good as a defense. The plaintiff is presumably a responsible person, able to meet any recovery which the defendant may obtain upon his counter-

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claim in the first action. If not, that circumstance might perhaps have furnished a sufficient reason for a special application to stay all proceedings in the present action until the first was disposed of. But no motion of that kind has been made. The present action has been called for trial, and it must be disposed of according to the strict legal rights of the parties as set out in their pleadings.

It may be suggested with some force, perhaps, that the principles underlying the cases of *Fabricotti* agt. *Lannitz* (3 *Sandf.*, 743; *Wilste* agt. *Northam* (3 *Bosw.*, 163); *Fuller* agt. *Read* (15 *How. Pr.*, 236); *Harris* agt. *Hammond* (18 *id.*, 123); *Naylor* agt. *Schenck* (3 *E. D. Smith*, 135) apply with equal force to this case—that the setting up of the counter-claim has no greater effect than the commencement of an independent action. In a limited sense this is so, but in a legal sense it has this further significance: by interposing the counter-claim the defendant prevented a recovery in the first action, which, according to the allegations and admissions of the pleadings must otherwise have gone to judgment for want of a legal defense. The court could not well compel the defendant to elect on which particular counter-claim he would rely, unless in law the one was a bar to the other; and if the law gave this effect to the pleadings, an order of the court stating the law would give it no additional force.

Fabricotti agt. *Lannitz* (3 *Sandf.*, 743) holds that a party who has brought an action is not precluded from setting the same matter up as a counter-claim in a cross action, but that he will be compelled to elect between his own suit and the recoupment claimed; and if he elects the latter, his own suit will be stayed. Suppose the defendant in the present case declines to elect, what will the court do with his double counter-claim?

The court might stay the second action perhaps; but suppose the plaintiff did not want his action stayed—and there are few plaintiffs that do—where is the plaintiff's remedy to be found? It seems to me that it is found in that which the

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plaintiff has evoked — viz., plea in abatement. The object of the stay, suggests judge WOODRUFF, in *Wilstee agt. Northam* (3 *Bosw.*, 168), was to prevent “needless litigation.” The defendant might, perhaps, have secured a stay of the present action on special application, as before stated, but no such motion was made. In *Fuller agt. Read* (15 *How. Pr.*, 236), it appeared that Fuller had sued Read for damages. Three days afterwards Read brought a cross action against Fuller upon a note of the latter. Both actions were brought in the superior court. Fuller put in an answer to the complaint in the latter action, setting up, by way of counter-claim, the same facts which he had stated as a cause of action in the complaint in the suit which he had previously commenced.

On an affidavit stating these facts, and upon the two complaints and the answer, and on motion of Reed, an order was made in both actions, requiring Fuller to elect within ten days either to proceed in the action which he had commenced to recover his damages, and declaring that if he so elected he should be precluded from giving evidence in support of his counter-claim, or to abide by his counter-claim, and declaring that if he so elected all proceedings in the suit brought by him should be stayed. If he failed to make the election within the time specified, the order further provided that he should be deemed to have elected to proceed in the suit he had commenced, and should be precluded from giving any evidence in support of his counter-claim, and that the answer containing it should be deemed to be stricken out.

Fuller appealed to the general term, and upon the appeal the order was reversed. The court, in rendering its decision upon the reversal, among other things, said: “When both actions shall have been put at issue, if it shall then appear that both causes of action may be tried on their merits in either suit, the court, in its discretion, may stay proceedings in one until the trial of that which involves the whole merits has been disposed of.” This is the character of motion which the defendants ought to have made here, and it might,

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in the exercise of a wise discretion, have been granted, either with or without terms.

The court in that case intimated that the facts constituting the counter-claim may have been available as a defense. The same thing may be true of the counter-claim pleaded in this action, but the difficulty is that here it is pleaded specially as a counter-claim, and not as a defense, nor as a "defense and counter-claim." The principle which underlies *Fabricotti* agt. *Lannitz* (*supra*) and kindred cases is explained by judge WOODRUFF, in *Naylor* agt. *Schenck* (3 E. D. Smith, 137). He says that a party who prosecuted a demand, and is afterwards sued by his adversary and pleads his original cause of action by way of counter-claim, is not prosecuting two actions, one of which abates the other. The learned judge then reasons out the rule as follows:

"In an endeavor to collect their damages, they (the plaintiffs) find themselves prosecuted by their adversary. They may defend by setting up any matter which the law recognizes as a defense, whether it be a cause of action or whether it be a judgment actually rendered thereon, the only difference being that after judgment it must be used as a judgment by way of set-off. The election made by the defendant was not an election to recoup. At that time it was an election between prosecuting to establish their claim or suffering the injury without seeking any redress. And when the plaintiff forced them into court upon the claim for rent, the opportunity to use their claim by way of defense first arose, and they had a right to embrace it."

In the present case the defendant knew that the plaintiff held the two notes sued upon; that he was prosecuting separate actions on each, and instead of contenting himself by interposing the counter-claim in the one first brought, and applying for a stay in the second action until the issues in the first were disposed of, he interposed the same counter-claim to the second, and thereby invited two trials of the same issue, when one would have secured him all the relief

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to which he was entitled. He may answer that an adjudication in the one will be conclusive upon the rights of the parties in the second.

This answer has force, but is overcome by the fact that if he is defeated in the one action he is entitled to try the same issue anew, unless the plaintiff proves the first adjudication, a duty which he thereby shifts from himself upon the plaintiff. I do not think he can do this, particularly where the duty carries with it the *onus* of proving the identity of the subject-matter litigated with the counter-claim pleaded; and this right in the plaintiff to prove the adjudication may not be secured until the court and the plaintiff have again listened to the proofs of the counter-claim. I think the record should not be so incumbered. If the defendant had procured a stay of the second action, and the first had been decided against him, that adjudication would have terminated the entire litigation.

The defendant's counter-claim amounts to \$5,500; it grows out of one transaction and is for unliquidated damages. There can be but one trial and one recovery upon it. It cannot be split up and divided into different causes of action, and cannot, in my judgment, be used successively to a series of actions brought by his adversary. If the damages had been liquidated by a judgment it might have defeated a recovery by the plaintiff, and might perhaps have been used in each suit to extinguish the cause of action therein (*Busherville* agt. *Brown*, 2 *Burr*, 1299). But this course would not have necessitated a double adjudication, for the problem would have been reduced to a mere matter of figures.

The defendant might have moved to consolidate the two actions, the issues being identical, and thus have avoided the present complication (*Code*, sec. 817), but he has failed to do so, and must not complain if the rules of practice laid down seem oppressive.

Under all the circumstances, I hold that the plea in abatement which the plaintiff presents, by his reply to the counter-

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claim, is a complete answer thereto, so far as this action is concerned, and upon this ground I direct judgment in favor of the plaintiff for \$348, the amount claimed, and interest.

SUPREME COURT.

CHARLES A. CLEGG, appellant, agt. WILLIAM E. CRAMER and others, respondents.

Counter-claims by defendants who are sued on alleged joint liability with others — Practice where such liability is denied — Such counter-claims allowed — Code Civil Procedure, section 1204.

Where, in an action brought by plaintiff for the recovery of damages for the breach of a contract alleged to have been made by eleven defendants contracting jointly, the answer of three of the defendants denies the making of the contract alleged, but avers that the contract, whatever may have been its terms, was with the three defendants, and in respect to that sets up counter-claims:

Held, that such counter-claims are tenable and well pleaded under section 1204, Code of Civil Procedure; that these defendants were not concluded by the allegations of the complaint, but could deny the joint liability, aver a several liability as to themselves, and then set up their counter-claims; that the issue as to whether the contract was with all the defendants sued, or those who set up the counter claims only, is an issue to be determined on the trial of the case, and if it should turn out to be correct, as the answer avers, the counter-claims would be legally applicable to any claim which might exist in favor of the plaintiff under the agreement or agreements (*Affirming S. C.*, 60 *How.*, 498).

General Term, May, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an interlocutory judgment of special term, overruling plaintiff's demurrer to counter-claims pleaded in the answer of defendants Cramer, Aikens and Cramer.

Charles A. Clegg, an advertising agent, sued William E. Cramer, Andrew J. Aikens and John F. Cramer, joining with them as defendants eight others, declaring a breach on their

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part of a contract with him for advertising in various newspapers.

The complaint alleges that at all times defendants Cramer, Aikens & Cramer, were and are co-partners, doing business under that name in the city of Milwaukee, as proprietors and managers of the Milwaukee List of Newspapers; and that they, with the other eight defendants, were jointly and severally engaged in printing and publishing newspapers in different parts of the United States.

The three defendants, Cramer, Aikens and Cramer, answer separately: Admit and aver that they were at all times copartners in that firm name, doing an advertising business as proprietors of space in the Milwaukee Newspaper Union; that as such copartners, and in no other capacity, they contracted with plaintiff; admit that their firm did advertising for plaintiff; that plaintiff paid money to the firm, and that the other defendants also did business with plaintiff, but not as alleged in the complaint. Their answer also denies the allegations of the complaint not specifically admitted or controverted. The answer then sets forth thirty-three contracts for advertising made with plaintiff, on each of which a specified sum is shown due, and asks for judgment.

The plaintiff demurs to the answer of these defendants on the ground that the counter-claims are not of the character specified in section 531 of the Code, and specifies that Cramer, Aikens, and Cramer, are sued jointly with the other eight defendants, and that a separate judgment as to them cannot be had in the action.

The court below overruled the demurrer on the ground that it might appear on the trial that the liability of these defendants was several, as they themselves aver, and not joint as alleged by plaintiff.

Solomon Hanford (William H. O'Dwyer, attorney) made and argued the following points:

I. The counter-claims are clearly inadmissible (*Code, sec.*

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501). The liability sued on is joint only, and the rules to be applied are those relating to suits against joint debtors. These rules necessarily forbid the allowance of any such counter-claims as those in question, and the Code has made no change in these rules (1 *Bliss Code*, p. 370, n. [c], [f]; *Perry agt. Chester*, 53 *N. Y.*, 240; *Bridge agt. Payson*, 5 *Sandf.*, 210; *Mynderse agt. Snook*, 1 *Lans.*, 489; *Speyers agt. Fisk*, 3 *Hun*, 706). The view taken by the learned judge below is expressed in the following extract from his opinion: "The Code of Procedure now provides that judgment may be given for or against one or more defendants. The ultimate rights of parties on the same side, as between themselves, may be determined, and a defendant granted any affirmative relief to which he is entitled (*Code Civil Pro.*, sec. 1204). The former rule has thus been radically changed. Should it appear on the trial of this action that the defendants, Cramer, Aikens and Cramer, alone were liable, the plaintiff would be entitled to a judgment against them, while the complaint would be dismissed as to the other defendants. These defendants, in their answer, deny joint liability with others, averring it to be several, if any exists. They are entitled to a trial of this issue, and, if successful, should be allowed to urge their counter-claims" (*McIntosh agt. Ensign*, 28 *N. Y.*, 169). In the first place the learned judge is mistaken in his statement that there has been any radical change within any very recent period in the rules relating to the subject of suits against joint debtors. The case of *McIntosh agt. Ensign* (28 *N. Y.*, 169), which was decided in 1863, holds merely that in a suit against a number of defendants, sued jointly, the plaintiff may recover judgment against those against whom he proves a cause of action. It does not, nor does any other case that we are familiar with, hold that the change of law above referred to permit individual counter-claims to be set up in a suit on an alleged joint liability. In the second place, the learned judge is mistaken in holding that the defendants' denial of their joint liability can affect the character of the action. Can it be

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held that because the defendants deny their joint liability the cause of action is in consequence joint and several in its character? The only cases where individual counter-claims have been permitted to be interposed are those in which the defendants' liability is clearly several, where a separate judgment could be obtained, and where, but for some statute, the plaintiff would have had to bring a separate suit against each defendant in the first instance (*Newell* agt. *Sulmons*, 22 *Barb.*, 647). And in such cases as these the plaintiff would be at liberty to sever the action. In the present case, however, the cause of action is joint only. In other words, the liability of the defendants is simply that of copartners (*Baldwin* agt. *Briggs*, 2 *Abb. N. C.*, 216; *Peabody* agt. *Bloomer*, 3 *Abb. Pr.*, 360). Suppose, for the sake of argument, that each defendant in this suit should be permitted to set up his thirty or forty counter-claims, what would be the course of procedure at the trial? According to the opinion of the judge below, the question of the character of the defendants' liability, whether joint or several, would have to be determined first. But how would this be done? If his honor would have kindly indicated some method of procedure in this regard, the necessity for the present appeal might have been obviated. But unfortunately we are confronted with the principle that but one judgment could be rendered in such an action as the present, and that all the issues must be determined at once. Certainly, the case could not be tried by piecemeal, or in any other way than by putting in all the evidence on each side. At what stage of the action could it possibly be determined that an individual defendant might offer evidence in support of his own counter-claims? Again, suppose, for the sake of argument, that the plaintiff introduces all his evidence, and that such evidence tends to prove a joint liability on the part of all the defendants; the defendants, then, without attempting to disprove the plaintiff's case, introduce evidence in support of these one hundred and fifty counter-claims, and the case is then submitted to the jury.

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What kind of a verdict and what kind of a judgment or judgments would be entered? Bearing in mind that the plaintiff proves a joint liability to the satisfaction of the jury, and the defendants prove their separate counter-claims in like manner. It is submitted that any such rule as that contended for by the defendants would lead to more confusion in the administration of justice than the court will sanction at the present time. The effect of such a rule, it is needless to say, would clearly operate to effect a denial of justice. If it were to prevail, every unfortunate plaintiff could be called upon to try a vast number of issues. In this case he is tendered thirty-one by a single defendant, and everyone of such issues entirely unconnected with the main cause of action.

II. The judgment appealed from should be reversed and the plaintiff's demurrer sustained.

Chauncey B. Ripley, on behalf of the defendants (*Joseph S. Auerbach*, attorney for defendants Cramer), argued the following points:

I. These defendants in their answer deny joint liability with others, averring it to be several if any exists. They are entitled to a trial of this issue, and if successful should be allowed to urge their counter-claims (*McIntosh* agt. *Ensign*, 28 *N. Y.*, 169).

II. The common-law rule that upon a claimed joint liability of the defendants the recovery must be against all the defendants or none was abrogated by the Code; and now the Code not only authorizes but requires judgment according to the facts established against the defendants liable only, and dismissal as to the rest (*Brumskill* agt. *James and Eaglesum*, 11 *N. Y.*, 294, followed by *McIntosh* agt. *Ensign*, *supra*; *Code Civil Pro.*, sec. 1204; *Hubbell* agt. *Meigs*, 50 *N. Y.*, 489, at foot, approving *McIntosh* agt. *Ensign*).

III. It does not now depend upon the allegations in the complaint as to the joint liability of all the defendants, but upon the fact whether they are all liable; and if some are

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liable and others not, the plaintiff may have judgment against such as the evidence showed to be liable. So if the answer deny joint liability and aver it to be several, a triable issue is thereby raised. 1. "These positions are well understood and have received the sanction of the courts; that defendant, upon showing that one of several plaintiffs is the sole party in interest, may avail himself of a set-off (counter-claim) in all respects as if the action had been brought in the name of such plaintiff alone; that where several persons are made defendants as upon a joint contract, and the plaintiff so declares in his complaint, but the proof shows that in point of fact only a portion of the defendants made the contract, the plaintiff can recover against such defendants as in fact were liable; that it does not now depend upon the allegations in the complaint as to the joint liability of all the defendants, but upon the fact whether they are all liable; and if some are liable and others not the plaintiff may have judgment against such as the evidence showed to be liable" (*Cowles and Curtis* agt. *Cowles*, 9 *How.*, 361; approved in *Palmer* agt. *Davis*, 28 *N. Y.*, 246, 247; *Code Pro.*, sec. 274; *Code Civil Pro.*, sec. 1204; *Brumskill* agt. *James*, 1 *Ker.*, 294; *People* agt. *Cram and White*, 8 *How.*, 151; *Zink* agt. *Attenburg*, 18 *How.*, 111; the two latter cases disapproving *Fullerton* agt. *Taylor*, 6 *How.*, 259; *Simar* agt. *Canady*, 53 *N. Y.*, 301; approving *Palmer* agt. *Davis*, 28 *id.*, 242; *Bathgate* agt. *Haskin*, 59 *N. Y.*, 533). 2. But the complaint itself alleges a "joint and several" relation and thus brings the case within *Parsons* agt. *Nash* (8 *How.*, 454), followed by *Newell* agt. *Salmons* (22 *Barb.*, 647, 651), and, also, *Briggs* agt. *Briggs* (20 *Barb.*, 447, 449).

IV. As a matter of pleading, the counter-claims become available to these defendants the moment a separate judgment is shown possible under the issues raised. That a separate judgment is possible under the answer denying joint and alleging several liability is shown above. (1.) Two sets of issues are uniformly involved when a counter-claim is pleaded

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in the answer. In such case, no matter what be the form of action, whether legal or equitable, if plaintiff allege a joint obligation as to defendants, any number of them may unite in a separate answer, controvert the allegations of the complaint, aver a several contract between plaintiff and themselves, and as to that set up a counter-claim. That a joint judgment is also possible under plaintiff's theory does not exclude the allowance of the counter-claims, as a matter of pleading. Defendants, equally with plaintiff, are entitled to a trial of the issues raised by their own pleading; the court will determine the ultimate rights of the parties and grant any relief, affirmative or otherwise, which the proofs may justify. In actions alleging a joint liability and under the sections of the Codes above referred to, the general terms of this court and the court of appeals have held that a denial by defendants of joint liability and an averment of a several liability raises an issue which, if successful, renders available counter-claims set up by such defendants (*See Cowles agt. Cowles; Palmer agt. Davis; Code, sec. 1204; Brumskill agt. James; People agt. Cram; Zink agt. Attenburg, cited in point third, above*). (2.) The authorities cited by appellant (*Perry agt. Chester, 53 N. Y., 240; Taylor agt. Root, 4 Keyes, 335*) are those of cases where actions were founded upon liability conceded to be either joint or several, with no issue made upon that subject.

V. No objection to the counter-claims is specified in the demurrer except the one already considered; none is, therefore, available on this hearing (*Code Civil Pro., sec. 496*); and since the counter-claims are in other respects well pleaded, all the averments are admitted by the demurrer under the rule (*Groesbeck agt. Dunscomb, 41 How., 302*). And in this case such admission involves all the material averments of the first answer, for the first answer is renewed and repeated, and, therefore, adopted as a part of each counter-claim subsequently pleaded (*Hammond agt. Earle, 58 How., 426, 437, and cases there cited*).

VI. Plaintiff's complaint is defective, and having himself

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first committed errors in pleading he cannot prevail on this demurrer, even though the answer were insufficient *per se* (*People* agt. *Booth*, 32 *N. Y.*, 397; *Allen* agt. *Malcolm*, 12 *Abb. [N. S.]*, 235, 237; *Stoddard* agt. *Onondaga Annual Conference*, 12 *Barb.*, 573, 575). The defects of plaintiff's complaint which render it demurrable are given below. I. Plaintiff's action is for damages for a breach of contracts, but there is no assignment of breach such as good pleading requires. The assignments are three only and as follows: 1. The averment "that defendants did then and there break the said agreements" is no sufficient assignment of breach under the rules of pleading, for a denial of it would raise no issue; it admits of no evidence; it would not support a verdict or a judgment; it is a conclusion of law, a mere nullity; no issuable fact is alleged (*Van Schaick* agt. *Winne*, 16 *Barb.*, 89, 95). 2. So the averment "then and there admitting that they had not kept but had broken their said agreement," is matter merely evidentiary and insufficient on demurrer (*Badeau* agt. *Niles*, 9 *Abb. N. C.*, 48; *Kelly* agt. *Waterbury*, 87 *N. Y.*, 179). Nor is it conclusive evidence even (*Mills* agt. *Gould*, 1 *Abb. N. C.*, 97). That the alleged admission is merely evidence for a jury and not matter to be pleaded; and that it is bad evidence because a part of it is withheld, to wit, "various facts and excuses in extenuation," there can be no question (1 *Greenl. on Ev. [11th ed.]*, secs. 201, 218). Statement of partial evidence of a fact is not an averment of the fact (*Page* agt. *Boyd*, 11 *How.*, 415). "The issuable facts in a legal action, and the facts material to relief in an equitable suit, should be stated to the complete exclusion of the law and the evidence" (*Pomeroy's Remedies and Remedial Rights*, secs. 529, 526; *Steph. on Plead.*, 310). Matter evidentiary "is not capable of trial" under an elementary rule too well settled to need authority (1 *Chitty on Plead. [16th Am. ed.]*, 566, 248, 249; *Fidler* agt. *Delavan*, 20 *Wend.*, 58). 3. The refusal, as alleged "defendants wrongfully and fraudulently refused further to print," &c., is not operative as a breach for the

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reasons: First. It does not appear affirmatively, as the cases require, that the refusal was addressed to defendants, or to anyone on their behalf who had a right to demand or accept performance. It was not, so far as the complaint shows, a refusal *inter partis*. For aught that appears "it might have been a refusal answering to the plea, had it been addressed to a neighbor no way connected with the defendant, and of which he had never heard;" "the declaration to a third person was not a breach." It should appear upon the face of the complaint that the refusal was addressed to the plaintiff or to his authorized representative" (*Traver* agt. *Halstead*, 23 *Wend.*, 66, 70; *McDonald* agt. *Williams*, 1 *Hilt.*, 365; *Thompson* agt. *Gould*, 16 *Abb.* [*N. S.*], 424, 428; *S. P.*, *Mills* agt. *Gould*, 1 *Abb. N. C.*, 93, 97). The breach of a contract, like the contract itself, must be *inter partis* (*Hart* agt. *Hart, Jr.*, 14 *How.*, 418, 424); a stranger cannot participate (1 *Pars. on Contrs.* [5th ed.], 8). Second. The further averment "and did then and there notify the plaintiff of such refusal" is conclusive evidence that the refusal itself was addressed to some person other than plaintiff; otherwise this averment would be without force (*Traver* agt. *Halstead*, 23 *Wend.*, 66, 70); "and, if it was entitled to any weight, could only be of use in relieving the plaintiff from liability for not being ready" (*McDonald* agt. *Williams*, 1 *Hilt.*, 366). Third. If the refusal itself was a nullity, it follows necessarily that any notice of it must be without legal force; for a nullity furnishes no basis for any legal proceeding (*McNamara on Nullities*, 6 [1]). Fourth. Another fatal defect is, it does not appear and there is nothing to show that any work was done when the refusal was uttered, that the time for performance had arrived. To render a refusal effectual as a breach, the time for performance must have actually arrived and passed, so that there remains no *locus penitentiæ*. For aught that appears defendants were under no obligation then to do anything; they may have had time to perform in the future; it is only when the day for performance has passed that an

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action can be maintained for refusal in our state. In England it is otherwise (*Shaw* agt. *Republican Life Ins. Co.*, 69 *N. Y.*, 286, 293); until this happens no legal right has been violated (*Burtis* agt. *Thompson*, 42 *N. Y.*, 246, 250); such is the well established rule (*Cases cited in* 69 *N. Y.*, 293; *Ford* agt. *Tiley*, 6 *B. & C.*, 325; *Franchot* agt. *Leach*, 5 *Cow.*, 506; *Traver* agt. *Halstead*, 23 *Wend.*, 66). Fifth. The characterizing words "wrongfully and fraudulently" add nothing to the badly pleaded refusal. "It has been repeatedly decided that the allegation that an act is 'unlawful' is not the statement of a fact, but a conclusion of law." (*Ensign* agt. *Sherman*, 13 *How.*, 37, at foot), and the rule is the same respecting characterizing words generally.

II. Plaintiff fails to show by averment of facts that he has suffered any damage whatever; nothing appears upon the subject but legal conclusions. A pleading is ill on demurrer when, founded on a claim for damages, it avers nothing but the pleader's own inferences and conclusions. 1. Such vague generalities as "has been greatly damaged," "has sustained damages to the amount of," &c., are not issuable matter (*Van Schaick* agt. *Winne*, 16 *Barb.*, 89, 95). 2. Facts must be pleaded from which damages may appear to have arisen, such as, for example, that the work was not done; that some specific customer neglected to pay; that defendants omitted to do some particular thing that they were obligated to do under their contracts. Nothing of the sort is set forth in the complaint; not a single omission; only a refusal uttered to some third person of which plaintiff had notice. The averment of substantial damages is essential in a case like this, since a refusal is only a constructive breach, from which no damages flow. Damages must be pleaded and proved (*Allen* agt. *Gould*, 1 *Wend.*, 182, 185; *Thompson* agt. *Gould*, 16 *Abb.* [*N. S.*], 424, 428; *Rider* agt. *Pond*, 28 *Barb.*, 447; *Mills* agt. *Gould*, 1 *Abb. N. C.*, 97). The foregoing authorities hold distinctly that the breach claimed in such cases is not actual but constructive merely; that a refusal

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operates as a breach by reason of prejudice to plaintiff arising from the refusal. If there is no damage there is no breach. The damage of the refusal is the gist of the breach. If there is no damage, no withholding, no neglect or omission, in short, if the refusal is naked, no right is violated, and consequently there is no breach. Performance must be shown to be due, that the refusal may take effect (*Traver agt. Halstead*, 23 *Wend.*, 71). III. Plaintiff's agreement of August 1, 1876, in which the previous agreements are merged, is an agreement with and on behalf of defendant Aikens alone; it so appears on its face, and any mere allegation of plaintiff that it was made on behalf of all the defendants is simply his own erroneous legal conclusion, inconsistent with the express language of the letter itself; the court will construe the agreement and determine who are bound by it and to what its provisions relate; it is a question of law not pleadable (*Latham agt. Westervelt*, 26 *Barb.*, 261; *Barton agt. Sackett*, 3 *How.*, 358). The agreement is the best evidence of its own meaning. It is addressed to defendant Aikens, and accepted by him; and as to the descriptive words, "Pres't American Newspaper Union," they are surplusage so far as the contract is concerned. So the word "president" affixed to the signature, "A. J. Aikens," at the end, is descriptive merely, and of no legal force, as has been repeatedly held respecting contracts (*De Witt agt. Walton*, 9 *N. Y.*, 571). Besides, there is nothing in the complaint showing that defendant Aikens held any office or had any authority, as president, to bind other defendants; nor is there any allegation that he was in fact president, or that he was known as such. IV. The complaint is demurrable because a part of the defendants are not connected with the transactions therein referred to between May 3, 1876, and January 2, 1877, except as guarantors and on an alleged collateral liability which is not supported by any consideration moving from plaintiff; and it so appears on the face of the complaint. Such defect renders a complaint bad on demurrer (*Le Roy agt.*

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Shaw, 2 Duer, 626). Moreover, such allegation would not warrant a judgment against all the defendants on a joint liability, and therefore the complaint is demurrable under the very principle for which plaintiff himself contends on this hearing. V. The judgment for defendants Cramer, Aikens & Cramer, overruling plaintiff's demurrer, should be affirmed, with costs.

DANIELS, *J.*— The action was brought by the plaintiff for the breach of a contract alleged to have been made with the defendants for the publication of advertisements in various newspapers printed in different portions of the United States, and for the recovery of an amount alleged to have been paid for the expenses of advertisements not actually made. Three of the defendants answered, alleging in substance that the contract, whatever may have been its terms, was made with them, and then by way of further defense they set forth a large number of counter-claims upon the contracts alleged to have been made with them by the plaintiff, which he failed to perform. And it was to the portions of the answer presenting these counter-claims that the plaintiff demurred. His demurrer proceeded upon the ground that as the counter-claims were not alleged to exist in favor of all the defendants in the action, that they were improperly set forth in the answer of the three defendants. And this position would undoubtedly be true if the answer concedes a joint liability to the plaintiff by all the defendants. But it did not. The three defendants answering in effect alleged that the contract was made exclusively with them. And if that fact shall be established at the trial, then the complaint must be dismissed as to all the remaining defendants. For even if it be assumed that a joint contract has been set forth in the complaint as the ground of the action, the court at the trial can still award judgment in favor of the plaintiff against these three defendants, if as a matter of fact it shall be made to appear that they were the only persons liable to the plaintiff (*Code Civil Pro.*,

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sec. 1204; *McIntosh* agt. *Ensign*, 28 *N. Y.*, 169). And by the answer of the three defendants they asserted that to be the nature of the liability. They were not concluded upon this subject by any allegations contained in the complaint, but were at liberty to deny the alleged joint liability, and further to allege the fact to be that whatever contract had been made was made by themselves with the plaintiff. And if they should turn out to be correct in those allegations, then the action would become an action between the plaintiff and themselves, and in that contingency the counter-claims set forth by them in their answers would be legally applicable to any claim which might exist in favor of the plaintiff under the agreement or agreements relied upon by him. This was an entirely proper mode of proceeding. The three defendants were clearly entitled to aver that the liability relied upon by the plaintiff was wholly confined to themselves, and to follow that averment with such counter-claims as existed or might be alleged to exist in their own favor against him. This was the course of practice which they followed. It was entirely right, and the judgment from which the appeal has been taken should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concur.

SUPREME COURT.

JOHN WILKINSON agt. THE NORTH RIVER CONSTRUCTION COMPANY and ASHBEL GREEN, receiver thereof, &c.

Receiver — Order restraining, bringing or prosecuting proceedings. or in any manner interfering with assets — Effect of, on claimants not a party to action — Motions which must be made in first judicial district — Code of Civil Procedure, sections 602 to 635, 769, 1806, 1810, 1812, 1781 to 1803, 1885, 1886, 1681, 1787, 1940, 2265, 2451.

Motion by plaintiff or claimant to commence an action against G., as receiver of the North River Construction Company, for the foreclosure of a mechanic's lien filed in the clerk's office of Oneida county. On the 11th of January, 1884, this court at special term thereof held in the

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first judicial district, appointed G. receiver of said construction company in an action brought by one W. a stockholder, against said construction company as defendant. G. had been previously appointed such receiver by a court of chancery of the state of New Jersey. On February 7, 1884, the special term in first district made an order in said W. case, restraining all persons from bringing or prosecuting any such proceedings against the construction company or in any manner interfering with its assets until the further order of the court:

Held, that the motion could not be made until the order of February seventh was vacated or modified.

The order is valid and binds the plaintiff, as claimant in this action, precisely as if he were an actual party to the action in which that order was made.

An application to vacate or modify such order and for leave to sue the receiver might be joined in one motion, but such a motion could only be made in the first judicial district.

Oneida Special Term, February, 1884.

MOTION by plaintiff or claimant to commence an action against Ashbel Green, as receiver of the North River Construction Company, for the foreclosure of a mechanic's lien, filed in the clerk's office of Oneida county on the 21st day of December, 1883.

The petition, which is entitled as above, alleges the appointment of Ashbel Green as receiver of the North River Construction Company, a corporation organized under the laws of the state of New Jersey, and that thereupon said receiver succeeded to all the right, title and interest of said company. That John Wilkinson, the petitioner, has the claim amounting to \$717.93 against the Holmes Brothers, as contractors with said construction company, for labor performed and material furnished for the erection of a passenger freight depot at Vernon in the county of Oneida.

That the New York, West Shore and Buffalo Railroad Company, a corporation organized under the laws of New York and New Jersey, is the owner of said depot building and of the land upon which the same stands; that the construction company was the contractor with the railway com-

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pany for the erection of said building, and that said receiver is made a party to this action for the complete determination of all rights or equities between said owner, contractor and claimant.

The petitioner further alleges that "this action is commenced to enforce a lien against the buildings of said railway company," and that no personal claim is made against the receiver of the construction company.

In opposition to this motion affidavits were read showing that on the 14th of January, 1884, this court, at a special term thereof, held in the first judicial district, appointed Ashbel Green receiver of said construction company, in an action brought by Charles E. Woerishoffer, a stockholder, as plaintiff, against the North River Construction Company as defendant.

That the same person had been previously appointed such receiver by a court of chancery of the state of New Jersey.

It also appeared that on the 7th day of February, 1884, the special term in first district made an order in said Woerishoffer's case restraining all persons from bringing or prosecuting any such proceedings against the construction company, or in any manner interfering with its assets until the further order of the court.

The principal office of the construction company has always been located in the city of New York.

The receiver says, in his affidavit, that the state of account between the construction company and the railway company is such as to require a long, tedious and expensive accounting to determine what balance is due from the latter to the former.

Judson & Tracey, for motion.

C. B. Alexander, opposed.

VANN, J. — Judge GREEN was apparently appointed under the power conferred by section 1810 of the Code of Civil

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Procedure. By the third subdivision of that section the court is authorized to appoint a receiver of the property of a corporation in an action brought by a stockholder to preserve its assets. This section, which applies to both foreign and domestic corporations (*sec.* 1812), is the only one authorizing the appointment of a receiver for a corporation created under the laws of another state.

Section 1806, which authorizes an injunction to restrain creditors from bringing actions does not apply to section 1810, but only applies to actions brought as prescribed in articles 2, 3 and 4 of title 2, chapter 15, or sections 1781 to 1803, inclusive. Article 2, which includes sections 1781 to 1784, authorizes actions against the trustees, directors, managers or other officers of a corporation to regulate and control their conduct, but does not authorize any action against the corporation itself.

Articles 3 and 4, sections 1784 to 1804, apply only to domestic corporations or those created by or under the laws of this state. It is apparent from reading sections 1885 and 1886 together, that the order of the special term in the first district, granted February seventh, cannot be regarded as an injunction order made under section 1806. As an injunction order proper no authority can be found in the Code (*Secs.* 602 to 635, 1681, 1787, 1806, 1809, 1876, 1940, 2265 and 2451).

It does not follow, however, that the order was invalid even if it was not expressly authorized by statute. The power to appoint a receiver implies the power to adequately protect him. An attack upon the receiver, who is merely the creature and agent of the court, is an attack upon the court itself. It has accordingly been held that the court appointing a receiver of the property of the corporation has the power to stay further proceedings in an action then pending against such corporation upon motion and without a suit commenced for that purpose (*Attorney General agt. Guardian Mutual Life Ins. Co.*, 77 N. Y., 272, 276).

The appointment of such receiver is for the benefit of all

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creditors and is in the nature of a judgment for all. It is binding upon them all, even if none of them are named as parties or in any way assent to it. They therefore become subject to the order of the court to the same extent as if they were parties to the record in the action in which the receiver was appointed.

The receiver is their representative and through him they become parties to the action. As was said by judge ANDREWS in delivering the opinion of the court in the case last cited :

“The creditors are parties to the proceedings for the dissolution and winding up of the corporation *through the receiver*, and as such are subject to the control of the supreme court and may be restrained from any interference with the assets in the hands of the receiver or with his administration of the affairs of the corporation.”

If the court can, by an order made in the original action, restrain a creditor from prosecuting a suit already commenced, it can, by a like order, restrain a creditor from commencing an action. If it can by a special order restrain one creditor it can by a general order restrain all. Such an order is not an injunction under the Code, but an order staying the proceedings of a party. It forbids all from interfering with the property which the court, through its officers, holds for the benefit of all.

It follows that the order of February seventh, made at Special Term in the city of New York, is valid, and binds the plaintiff, as claimant in this action, precisely as if he were an actual party to the action in which that order was made. The following authorities are cited in support of this conclusion : *Attorney General* agt. *Guardian Life Insurance Company* (77 *N. Y.*, 272, 276, 277); *Thompson* agt. *Brown* (4 *John. Ch.*, 619, 643); *Noe* agt. *Gibson* (7 *Paige*, 513); *Angel* agt. *Smith* (9 *Vesey, Jr.*, 335); *In re Heming* (2 *Paige*, 316; 2 *Story Eq. Jur.*, secs. 833, 891; *Barb. Ch.*, 73).

The claimant is not a creditor of the construction com-

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pany in the ordinary sense of the term; and he expressly states in his petition that he makes no personal claim against the receiver. This, however, cannot relieve him from the effect of the restraining order, because his lien can only be worked out through the construction company. He has no lien upon the railway company, except to that extent that it is indebted to the construction company. That debt, subject to the lien, belongs to the receiver, who holds it for the benefit both of the claimant and the creditors of the construction company.

This motion cannot, therefore, be made until the order in question is vacated or modified. An application for such relief and for leave to sue the receiver might be joined in one motion. Such a motion, however, could only be made in the first judicial district (*Code of Civil Procedure, sec. 769*).

The motion is denied, but, as the practice is unsettled, without costs.

SUPREME COURT.

HENRY D. DONNELLY, as sequestrator, &c., agt. WILLIAM WEST and MARY McDONALD.

Action for divorce — Affidavit and order for publication of summons — Sufficiency of affidavits to authorize court to grant order — Jurisdiction.

Proceedings will be upheld when taken in good faith, in the absence of any affirmative evidence disproving the facts alleged, if the original papers contained evidence calling for the exercise of the judgment of the officer who is required in the first instance to determine their sufficiency.

Where a court or officer has such a degree of evidence before him as fairly to require the exercise of judgment upon its weight and effect, an erroneous conclusion simply renders his act voidable but not void. When the proof has a legal tendency to make out a proper case in all its parts for using the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose.

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In an action for a limited divorce the plaintiff stated in her affidavit that the summons was issued on or about March twenty-eight last, that she is informed by her attorney and verily believes that diligent efforts have been made to serve the same on the defendant, but that he cannot be found within this state and that personal service, for that reason cannot be made within this state. She then avers that prior to and at the time of issuing the summons, the defendant resided in the city of New York, but that since such time she has been informed by the defendant, by a letter received from him, that he has gone to Greenwich, Connecticut, to reside, and that he resides there, and that deponent has also been informed by others, and believes, that the defendant is boarding and staying at Greenwich, and as deponent is informed and believes he is remaining there to avoid the service of the summons on him. That defendant has a dwelling-house which he has heretofore long occupied as a residence in the city of New York and a large amount of property in that city, and that he is the husband of deponent, and that she separated from him because of his ill-treatment of deponent at the city of New York, and his refusal to support her, and that this action is brought for a limited divorce, and to obtain a decree or judgment for a separation and for a separate support and maintenance, and that the place of trial is in Chemung county. And deponent further says that a good cause of action exists against this defendant and for which this action is brought. Accompanying this affidavit are two affidavits by parties employed, stating the efforts which they had made to serve the defendant within this state.

Held, that the facts stated in these affidavits is evidence sufficient to justify the judge in his conclusion as to the non-residence of the defendant, and as to his having departed from the state with the intent to avoid the service of the summons, and there certainly was some evidence that the defendant could not, with due diligence, be found or served within the state.

While it is necessary for the affidavit to show facts constituting a cause of action, it is not necessary to give all the evidentiary facts. The resultant facts are sufficient, if stated in the affidavit, to give the court jurisdiction.

Held, that the affidavit of plaintiff sets forth the resultant facts, to wit: That in consequence of his ill-treatment of her and his refusal to support her at the city of New York, she separated from him and that this action is brought for that reason.

Held, further, that there is enough in the affidavit to bring the case within one or both of the provisions of 3 Revised Statutes, page 157, which permits a separation for the cruel and inhuman treatment by the husband of his wife, and also "for such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him.

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Held, also, that there was in this case evidence before the judge who made the order for publication (though slight), tending to show that both parties were in legal contemplation inhabitants of this state at the time of the commencement of this action in which the plaintiff was appointed sequestrator.

Although it might be that on an application directly to open the judgment in the case of *West agt. West*, the court would deem that the affidavit on which the order of publication was based, was not sufficiently specific, yet in this action the record of this judgment is *prima facie* evidence and must be held conclusive until clearly and explicitly disproved.

Special Term, December, 1880.

THIS action is brought by the plaintiff who was appointed sequestrator of the personal property of defendant West, to set aside certain conveyances made by him to his daughter, as fraudulent and void as against the plaintiff in actions of *West agt. West*.

E. H. Benn, for plaintiff.

John McDonald and *William Fullerton*, for defendant.

LAWRENCE, J. — It is said by COUNTRYMAN, J., in *Handly agt. Quick* (47 *How. Pr.*, 235) that the general tendency of the recent decisions is to uphold the proceedings when taken in good faith, in the absence of any affirmative evidence disproving the facts alleged, if the original papers contained evidence calling for the exercise of the judgment of the officer who is required in the first instance to determine their sufficiency. And the authorities cited by the learned justice, in his opinion, seem to fully sustain his view of the law (*See Van Wyck agt. Hardy*, 39 *How.*, 392; *Waffle agt. Gable*, 53 *Barb.*, 517; *Peck agt. Cook*, 41 *Barb.*, 549; *Miller agt. Adams*, 52 *N. Y.*, 409; *Steinle agt. Bell* agt. 12 *Abb. [N. S.]*, 171; *Talcott agt. Rosenberg*, 8 *Abb. [N. S.]*, 287).

And Mr. justice DANIELS, in delivering the opinion of the general term of this court in *Von Rhade agt. Von Rhade 2 T. and C.*, 491), says: "Where a court or officer has such a

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degree of evidence before him as fairly to require the exercise of judgment upon its weight and effect, an erroneous conclusion simply renders his act voidable, but not void." And he says again: "The rule upon this subject has been declared in the following terms: 'When the proof has a legal tendency to make out a proper case in all its parts for using the process, then, although the proof may be slight and inconclusive, *the process will be valid until it is set aside by a direct proceeding for that purpose*'" (See *Miller agt. Brinckerhoff*, 4 *Denio*, 118, 120; *Staples agt. Fairchild*, 3 *N. Y.*, 41, 46).

Tested by the rules above stated, I am of the opinion that there was sufficient in the affidavits presented to the county judge of Chemung county to call upon him to exercise his judicial judgment, and even if I were disposed to differ with him as to the judgment he formed upon those affidavits, I could not hold that the court had no jurisdiction over the defendant William West, and that the judgment rendered against him was therefore void (See *Von Rhade agt. Von Rhade*; 2 *Thompson & Cook*, 491, 494, 496; *Hall agt. Munger*, 5 *Lans.*, 100).

Mrs. West states in her affidavit that the summons in this action was issued on or about the twenty-eighth day of March last; she then states that she is informed by her attorney, and verily believes, that diligent efforts have been made to serve the same on the defendant, but that the defendant cannot be found within this state, and that personal service, for that reason, cannot be made within this state. She then avers that, prior to and at the time of issuing the summons, the defendant resided in the city of New York, but that since the issuing of said summons she has been informed by the defendant, by a letter received from him, that he has gone to Greenwich, in Connecticut, to reside, and that he resides there; and that deponent has also been informed by others, and believes, that the defendant is boarding and staying at Greenwich aforesaid, in the state of Connecticut, and, as deponent is informed and verily believes, he is remaining there

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to avoid the service of the summons on him in this action. The deponent then alleges that the defendant has a dwelling-house, which he has heretofore long occupied as a residence, in the city of New York, and a large amount of property in that city; and that he is the husband of deponent; and that she separated from him because of his *ill-treatment of deponent at the city of New York aforesaid*, and his refusal to support her, about the eighth of April last; and that this action is brought for a limited divorce, and to obtain a decree or judgment for a separation from bed and board forever, and for a separate support and maintenance; and that the place of trial is in Chemung county. The affidavit proceeds: "And deponent further says that a good cause of action exists against the defendant, and for which this action is brought as aforesaid; and further deponent saith not." Accompanying this affidavit are two affidavits made by parties employed by the plaintiff's attorney, stating the efforts which they had made to serve the defendant within this state.

The county judge upon these affidavits declared that it appeared to his satisfaction that the defendant cannot, with due diligence, be found within this state, and that it further appeared by the affidavit of Emma E. West, the plaintiff, that a cause of action in favor of the plaintiff exists against the defendant. The order further recites "and it also appearing by affidavit as aforesaid that the defendant is not a resident of this state or has departed therefrom to avoid the service of the summons in this action, and that he now resides in Greenwich in the state of Connecticut, and that this action is for a limited divorce, to wit, to obtain a decree for a separation of the plaintiff from the defendant and for separate maintenance, and the place of trial being in Chemung county, &c., it is ordered that service be made on the defendant by publication," &c. How can it be said that these affidavits did not present any case calling upon the county judge to exercise his official judgment. Mrs. West shows in her affidavit that the defendant himself had stated to her by letter since her separa-

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tion from him that he had gone to Greenwich in the state of Connecticut to reside. This alone was a fact upon which the judge might well be justified in reaching the conclusion that the defendant was a non-resident, but taken in connection with the other facts stated in her affidavit and in the two accompanying affidavits, it was evidence both as to the non-residence of the defendant and as to his having departed from the state with the intent to avoid the service of the summons. And there certainly was some evidence in the other affidavits that the defendant could not with due diligence be found or served within this state.

But it is said that there is no evidence that Mrs. West had a cause of action against her husband, and the criticism is made that the affidavit is defective because it states in the language of the statute that a cause of action exists against the defendant. If that were all that the affidavit contained, the criticism might be just. But there is much more. Mrs. West, as has already been shown, swears that the defendant is her husband; that he has a dwelling-house which he has heretofore long occupied as a residence in the city of New York, and a large amount of property, and that she separated from him because of his ill-treatment of her *at the city of New York aforesaid and his refusal to support her*, about the eighth of April last, and that this action is brought for a limited divorce and to obtain a decree, &c. Now I do not understand that while it is necessary for the affidavit to show facts constituting a cause of action, it is necessary to give all the evidentiary facts. The resultant facts are sufficient, if stated in the affidavit, to give the court jurisdiction. Mrs. West's affidavit sets forth the resultant facts, to wit, that in consequence of his ill-treatment of her and his refusal to support her at the city of New York, she separated from him, and that this action is brought for that reason. It is also said that the statute does not authorize a limited divorce because of "ill-treatment," and that the affidavit is therefore defective.

The statute permits a separation for the cruel and inhuman

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treatment by the husband of his wife, and also "for such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him" (3 *R. S.*, 157).

There is, I think, enough in the affidavit to bring the case within one or both of these provisions of the statute. As to the objection that the affidavit does not show where the marriage was solemnized, nor the residence of the plaintiff, nor bring the case within any of the provisions of the statute in reference to the place of the solemnization of the marriage, it will be sufficient to refer to the language of justice DANIELS in *Von Rhade v. Von Rhade* (4 *Thompson & Cooke*, 497). The learned justice says: "As to the fact of inhabitancy the case was not entirely unsustained, because the complaint and the affidavit on which the order of publication was made, were both verified within this state by the plaintiff on the 10th of March, 1873, and she appears to have also been in this state when the order of reference was executed. From these circumstances the court could properly infer that she was an inhabitant of this state when the complaint was filed, and also through the month of March, 1873, when the defendant's misconduct was shown to have occurred." The case of *Otto agt. Otto* (8 *Weekly Dig.*, 413), was an application made directly to the court to set aside the order of publication. And *Yenni agt. Yenni* (reported 1 *Law Bulletin*, 2), seems to have been a refusal to grant the order in the first instance.

It may well be that on an application directly to open the judgment in the case of *West agt. West*, the court would deem that the affidavit on which the order of publication was based was not sufficiently specific, but in this action the record of the judgment is *prima facie* evidence, and must be held conclusive until clearly and explicitly disproved (*Bosworth agt. Vanderwalker*, 53 *N. Y.*, 597, and cases cited in opinion of FOLGER, J.).

It was held in *Hall agt. Munger* (5 *Lans.*, 100), that where

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an order of arrest had been granted in due form on affidavits setting forth but slight evidence of the requisite facts, *and which, on motion to set it aside, would be insufficient to support it, the order was nevertheless within the jurisdiction of the judge* and a protection to the party obtaining it, as well as to the judge who granted and the officer who made an arrest under it before it was set aside, *and that such an order was merely erroneous.* Besides there was in this case evidence before the judge who made the order for publication, slight, it is true, but some evidence tending to show that both parties were in legal contemplation inhabitants of this state at the time of the commencement of the action of *West agt. West.* (See those portions of Mrs. West's affidavit which refer to the long previous residence of the defendant in this city, and to the dwelling-house long occupied by him, and also accompanying affidavits.) (*Crawford agt. Wilson*, 4 *Barb.*, 519, 523).

The county judge in his order concludes that the defendant either resided out of the state, or had departed therefrom to avoid the service of the summons. If the latter fact was true, then West never had lost his inhabitancy in this state; and as regards his wife, the affidavit shows her to have been an inhabitant of this state when the separation took place, *at the city of New York*, and the verification of her affidavit was in Chemung county, within this state. If any presumptions are to be indulged in, the presumption must be that she had never gone out of this state (*Von Rhade agt. Von Rhade, supra*). If the judgment in the action in which the plaintiff was appointed sequestrator of the property of William West is valid, I do not see how the prayer of the complaint can be denied. That the conveyances which were made by him to his daughter, were made to prevent the wife from realizing the fruits of any judgment which she might obtain against him, I regard as most plainly apparent (*Donnelly agt. West*, 17 *Hun*, 564). The plaintiff is therefore entitled to judgment declaring that the conveyances and transfers mentioned in the complaint were fraudulent and void as against the judgment

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obtained by Emma E. West against William West, and as against the plaintiff, and he is also entitled to the further judgment which is demanded in the complaint.

Decreed accordingly.

SUPREME COURT.

WILLIAM B. WHITNEY and another agt. THE NEW YORK AND ATLANTIC RAILROAD COMPANY.

Corporate receiverships — Practice — Creditors' suit — Notice to attorney general is necessary in a creditors' suit to sequester property of railroad company — Receiver cannot be legally appointed without the giving of such notice — Rights of receiver in action to foreclose mortgage executed by company — When not necessary to give notice to attorney general.

A receivership in a creditor's suit to sequester the property of a railroad company comes within the spirit and intent of the law of 1883, requiring notice to be given to the attorney general of all proceedings in an action for the dissolution of a corporation or a distribution of its assets; and such receiver cannot be legally appointed without compliance with this provision. A receiver, in an action to foreclose a mortgage executed by the company, has the right to apply to be relieved from the void order or judgment, if it injuriously affects him in the discharge of his duties, although he has not in any form been made a party to the creditors' action.

Subsequent proceedings to subject the attorney general to the order and judgment appointing and continuing the receiver in the creditors' action without notice to the receiver in the foreclosure action, whose motion to vacate such order and judgment had been heard and submitted, were very improper and they had no practical effect in the case.

The order appointing the receiver in the creditors' action should, in any event, be so limited as to restrict his receivership to the property, contracts and effects of the company, not included in nor incumbered by the mortgage, which is unassailed.

It is not necessary to give notice to the attorney general, in an application for the appointment of a receiver in a suit, to foreclose a corporate mortgage.

First Department, General Term, March, 1884.

Before DAVIS, P. J., DANIELS and BRADY, JJ.

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APPEAL by Thomas S. Bullock, trustee and receiver, from an order denying a motion to vacate and set aside the order for judgment in this action, and from an order appointing George H. Henry receiver of the defendant and the judgment continuing his receivership, and from an order denying a motion for a rehearing of the preceding motion, and from an order confirming the judgment and the order appointing George H. Henry as such receiver.

Burton N. Harrison, for appellant.

J. Adriance Bush and *Charles De Hart Brower*, for respondent.

DANIELS, *J.*—The appellant, Thomas S. Bullock, as trustee under a mortgage executed by the New York and Atlantic Railroad Company for the security of its bonds, commenced an action in this court in Kings county, for the foreclosure of the mortgage, after such default on the part of the mortgagor as authorized the institution of such a suit.

By the terms of the mortgage, all the rights, liberties, privileges, income, tolls, receipts, resources, corporate franchises, railroad, then owned by the company, or afterwards to be owned, held or acquired, were mortgaged for the security of its bonded debt. This mortgage, which was executed on or about the 12th day of April, 1881, was afterwards and before the recovery of the judgment upon which the action of William B. Whitney and another was commenced, recorded in the office of the clerk of the county of Kings. And that record of it, by force of chapter 779 of the Laws of 1868, rendered it a valid mortgage, not only upon the real, but also upon the personal property included in it; for its consideration and good faith have in no manner been assailed or impugned in this action. And that it was lawful to include in the mortgage property designed to be afterwards acquired by the railroad company, was held in *Benjamin* agt. *Emira*

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Railroad Company (49 Barb., 441); *Hoyle agt. Plattsburg, &c., Railroad Company* (51 Barb., 45).

After the commencement of the action to foreclose the mortgage, and on the 5th of July, 1883, the appellant was, by an order of this court, also appointed receiver of the property mentioned and described in the mortgage, and he qualified as such and entered upon the discharge of his duties upon the following day. To the extent of the incumbrances created by the mortgage, he became invested under the order with the property, franchises and interests of the railroad company for the benefit of its bonded creditors.

On the 21st of February, 1883, William B. Whitney and Mahlon S. Kemmerer recovered a judgment against the railroad company for \$3,463.51, for goods sold and delivered. An execution was issued upon the judgment to the sheriff of the county of New York, in which the company had its principal office or place for transacting general business. The execution was returned unsatisfied, and an action was then commenced by these creditors to sequester the property of the company, and for the appointment of a receiver with the usual powers and duties. During the pendency of the action, and on the 2d of July, 1883, George H. Henry was appointed such receiver, and he qualified and entered upon the discharge of his duties upon the day following. On the 7th of July, 1883, a judgment was entered in the action, and the receivership of George H. Henry was made permanent. And as far as he was able to do so, he took possession of the office, books and property of the railroad company.

When these proceedings were taken, the company had not constructed its road to such an extent as to be able to put any portion of it in profitable operation, and the receiver appointed in the foreclosure action had no funds to proceed with its further construction. An application was made by him to a special term of this court in Kings county for liberty to issue certificates of indebtedness, as receiver, for a sum not exceeding, in the aggregate, \$61,500, for the construction and

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completion of the railroad under a contract authorized for that purpose. This application was successful, and the certificates were allowed to be issued, but in no case to exceed, in the aggregate, \$100,000. The contractor, in the first instance, agreed to receive the certificates and proceed with the construction of the railroad, but after ascertaining that George H. Henry had been appointed receiver in the action prosecuted by the judgment creditors, who claimed by virtue of his appointment the property of the company, he declined to do so, and it is to relieve the case of this embarrassment that the motions were made by the receiver in the foreclosure action to vacate the order appointing George H. Henry receiver and the orders afterwards made practically on the basis of that application. The motion proceeded substantially upon the ground that the order appointing George H. Henry, receiver, and the judgment confirming his appointment, were unauthorized and void, because of the omission to serve the motion papers upon the attorney general. And if that position was well taken, the receiver in the foreclosure action had the right to make the application, although he had not in any form been made a party to the creditors' action. For if the order or judgment was for any reason inoperative or void, and it interfered with and injuriously affected him in the discharge of his duties as receiver, for that reason he had the right to apply to the court to be relieved from it (*Gould agt. Mortimer*, 26 *How.*, 167), and that it did interfere with him to his prejudice in the discharge of his duties and the exercise of his authority was evident from the fact that it tended to discredit the certificates of indebtedness which, by the order of the court, he was permitted to issue to insure the completion of the railroad.

The application which was made to vacate the order appointing George H. Henry receiver in the creditors' suit was entertained by the court, but the point upon which it was presented was not decided. This was prevented by a motion afterwards made on behalf of the judgment creditors to obtain an order

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upon notice to the attorney general, confirming what were resisted by the receiver in the foreclosure action as a void and unauthorized order and judgment. The proceeding for this purpose was commenced after the other motion had been argued and submitted. It was brought on under a notice to show cause, made on the 27th of September, 1883, and returnable on the twenty-ninth. But the hearing was not delayed even to that date, for it was brought on by the appearance of the counsel for the creditors and the representative of the attorney general, on the 28th of September, 1883, and without opposition an order was then made confirming the order and judgment under which George H. Henry had been appointed as receiver, as of the preceding time when they were made and entered. This order on the following day was brought to the attention of the judge presiding at the time when the motion still under consideration had been made, and it was substantially because of the effect given to the order obtained on the twenty-eighth of September that the application of the receiver in the foreclosure action to vacate the appointment of George H. Henry as receiver was denied. In the proceedings to subject the attorney general to the order and judgment appointing and continuing George H. Henry as receiver, the receiver in the foreclosure action in whose behalf the motion, which had been previously argued and submitted, was made, was in no form brought in as a party. The order to show cause was not directed to him or his attorney, neither was it served upon either of them, and no notice whatever of the proceedings was given to either, but it was evidently taken, and the motion brought on, without the knowledge of himself or his attorney, for the purpose of overreaching and defeating the motion at that time awaiting the decision of the court. In this form it was certainly a very improper proceeding, and one that cannot be countenanced by any court charged with the duty of maintaining the orderly administration of the law. The receiver in the foreclosure proceedings had, by a motion previously made and submitted,

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become a party to that extent to the creditors' action, and was legally entitled to notice of any of the proceedings which might afterwards be taken for the purpose of rendering his application unsuccessful. And this circumstance necessarily deprived the order of the 28th of September, 1883, of all practical effect in the case. The receiver in the foreclosure suit would not, under any acknowledged principle of law, be bound by this order, as long as neither himself nor his attorney had notice of the application which was made for it. No such effect, therefore, could properly be given to this order as it was allowed to have by securing the denial of the preceding motion, which had been heard and submitted in August, 1883. That motion had been finally heard and submitted for decision before the order of the twenty-eighth of September, or the proceedings on which it was obtained, had any existence. The creditors in whose interest it was obtained had no legal right to submit it to the justice having the preceding motion under consideration for the purpose of influencing the determination of that motion. This was done in the absence and without the knowledge of the receiver in the foreclosure action, or of his attorney, and it resulted in securing a denial of the motion which had previously been argued and submitted. Such a practice cannot be too strongly condemned. No such effect could legally be given to the order, obtained in this manner, as it was allowed to have in the disposition of the motion, and for that reason the merits of the application are required to be considered precisely in the same manner as though this order had not been obtained and submitted to the learned justice having the preceding motion then under consideration.

The motion to vacate the order by which George H. Henry was appointed receiver, proceeded upon the omission of the creditors to comply with section 8, chapter 378 of the Laws of 1883. It has been urged by way of answer to this objection that the receivership in a creditor's suit of this nature against a corporation was not within the spirit or intent of this section. But by its terms this section was made to include

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an action for the dissolution of a corporation or the distribution of its assets. Two classes of cases are plainly the object of this legislation, and the same reason which would justify legislation for the government of an action for the dissolution of a corporation would suggest its propriety by way of controlling an action for the distribution of its assets. For in each case the property and assets of the corporation would be committed to the administration and disposition of the receiver. And the same propriety would exist in subjecting a receiver appointed in a creditor's action to the watchful observance of the attorney general, as would require an action for the dissolution of a corporation to be placed under the same supervision. If it was necessary or proper in one case it was equally so in the other, and, as the language made use of was entirely appropriate to include both, and they were equally within the mischief intended to be corrected, the section should be construed as attended with that effect. By section 1784 of the Code of Civil Procedure, the object to be accomplished by the creditors' action is the sequestration of the property of the corporation and the distribution thereof. And by section 1793 the judgment has been required to provide for a just and fair distribution of the property and of its proceeds among the fair and honest creditors of the corporation. And the mode of accomplishing this result is through the appointment of a receiver under the authority of section 1788 of the Code. The language made use of as descriptive of the object to be attained is identical with that of section 8, chapter 378 of the Laws of 1883, which was made to include an order of judgment for a distribution of the assets of the corporation. And in its enactment the nature and functions of such a receivership seem to have been within the intention and contemplation of the legislature. Before the receiver in the creditors' suit, therefore, would be legally appointed, a compliance with this section of the act of 1883 was required on behalf of the judgment creditors, and that they wholly failed to observe. This section of the statute declared that a

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copy of all motions and all motion papers and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding then pending or afterwards commenced, for the dissolution of a corporation or a distribution of its assets, should in all cases be served on the attorney general in the same manner as provided by the law for the service of papers on attorneys who have appeared in the action; and it is further declared that any order or judgment granted in any action or proceeding mentioned therein, without such service upon the attorney general, should be void. The provisions are broad and sweeping in their terms, and were intended by way of correcting and preventing abuses which at that time formed a subject of very general complaint in the administration and distribution of the property of insolvent corporations. And as this section was not complied with, either in the proceedings for the temporary appointment of Henry as receiver, or his permanent appointment under the terms of the judgment, both appointments within the terms of this action were void. This is plain and unequivocal language, and the courts are required to give it effect according to the import of the terms made use of. *Anderson agt. Roberts* (18 *Johns.*, 514) contained nothing in conflict with this conclusion. It was said in the opinion of SPENCER, C. J., in that case, that "a thing is void which is done against law at the very time of doing it, and where no person is bound by the act" (*Id.*, 528). The acts in controversy were acts of this character, and it was the evident purpose of this section of the statute to render them utterly ineffectual, where what has been so plainly directed shall not be observed. The service of the papers upon the attorney general was made jurisdictional, and a failure to make such service could not probably be corrected without an entirely new proceeding.

The motion which was made was an appropriate means of setting aside and vacating the void appointments (*Attrill agt.*

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Rockaway B. Imp. Co., 25 *Hun*, 376). And from the order denying the application the appeal was regularly brought to secure its reconstruction and correction (*Seaman* agt. *Whitehead*, 78 *N. Y.*, 306, 308).

A receiver appointed in a creditor's action of the nature of that now in controversy has been declared to have all the powers and authority conferred, and is made subject to all the duties and liabilities imposed upon a receiver appointed in the voluntary dissolution of a corporation (*Code Civil Pro.*, sec. 1788). The Code itself has not otherwise defined the powers authority and duties of such a receiver, and the proceeding, therefore, still remaining in force, is required to be consulted to ascertain these powers, authority and duties, and that law has been added by what is designated as appendices A and B of the Code of Civil Procedure. And by that law such a receiver has been invested with the powers and authority, and subjected to the obligations and duties designated by what is there given as section 42, appendix B. And by the succeeding section (sec. 67) of the same appendix, such receivers are declared to be vested with all the estate real and personal of such corporation, and are also further invested with the power and authority conferred by law upon trustees under an assignment of the estate of an insolvent debtor as they have been defined in chapter 5 of the second part of the Revised Statutes. Both the order and judgment making the appointment of Henry as receiver exceeded the bounds of this authority. For beyond investing him with the property, contracts, things in action, and effects of the corporation, they in terms invested him with the stock, bonds and franchises of the corporation, for which there was no authority either in the original appointment, or the continuance of the office of the receiver. What the creditors were entitled to through the intervention of their receiver was the property, real and personal, things in action, contracts and effects of the corporation, so far as they were owned by it at the time of his appointment. And this property could not legally include that

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which, by the force and effect of the mortgage, had been charged as security for the bonded indebtedness of the railroad company. To that extent, as the mortgage itself has not been assailed, it was a legal and valid incumbrance upon the railroad company, and in the action brought to foreclose it, the court was empowered to appoint a receiver to take charge of all the property, franchises and effects included within the terms of the mortgage. Over that subject the creditors, by means of their suit, had no control; for the title had, previous to their judgment, been incumbered in favor of the trustees named in the mortgage for the benefit of the bonded creditors of the company. For this reason, also, the order and judgment directing the appointment of Henry as receiver, and his continuance in the office, required to be corrected and so limited in any event as to restrict his receivership to the property, contracts and effects of the company not included in nor incumbered by the mortgage. And as that will secure the complete protection of the receiver appointed in the foreclosure action, it is probably as far as the court in these proceedings can be required to go in correcting the order and judgment in the creditors' suit. To that extent certainly the receiver under the mortgage is entitled to be relieved for the purpose of rendering his functions and office as efficient as they are required to be to carry into effect the security of the mortgage. Beyond that this receiver has no interest in resisting the proceedings prosecuted by the judgment creditors.

It has been suggested that as no notice was given to the attorney general of the application for the appointment of a receiver in the foreclosure suit, that the order for his appointment was inoperative under section 8, chapter 378 of the Laws of 1883. But that result does not follow from the omission to serve the motion papers for his appointment upon the attorney general, for he was not appointed a receiver in an action or proceeding for the dissolution of the corporation or the distribution of its assets; and they are the only actions or proceedings in which the motion papers are required to be

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served upon the attorney general. The authority to make his appointment as receiver is derived from the mortgage, and its object was to secure to the bonded creditors the benefit and effect of the mortgage security. With such a receivership these provisions of this part of the statute seem to have nothing to do.

The orders from which the appeals have been taken denying the motion made by the receiver appointed under the mortgage should be reversed, with the usual costs and disbursements, and the order and judgment appointing Henry as receiver should both be corrected by striking out from the order the words "its stocks, bonds and franchises," and by striking out the same words from the judgment entered in the creditors' action; and the appointment of Henry should also be restricted to such property of the corporation as has not been incumbered by the mortgage, or to the property and effects of the corporation subject to the mortgage, and the rights of the appellant in them under his appointment, for that is the utmost extent to which the creditors are entitled to the proceeds of the corporate property.

The creditors under the mortgage have the paramount right of payment so far as it extends, and the creditors under the judgment are necessarily therefore restricted to whatever surplus of proceeds there may be afterwards remaining out of the mortgage and to the property of the corporation not incumbered by the mortgage.

The appellant should be allowed the usual costs of the motion, but no order should be made in any form sanctioning or approving the residue of such order and judgment.

DAVIS, P. J., and BRADY, J., concurred.

Kee *et al.* agt. McSweeney.

SUPREME COURT.

JOSEPH R. KEE *et al.*, overseers, &c., agt. DENNIS
McSWEENEY.

Excise laws — Action to recover penalties for violation of — Complaint — when should be made more definite and certain — When bill of particulars will be required in such cases — Code of Civil Procedure, sections 531, 546, 1897 — When not necessary to indorse upon summons reference to statute.

Where, in an action to recover penalties for violation of the excise laws, the complaint charged that the plaintiffs were overseers of the poor, &c., and that the defendant was, on the 12th day of May, 1883, keeper and proprietor of a hotel known as the "Mansion House," in the town named, and on that day at said hotel, in violation of the provisions of chapter 628 of the Laws of 1857, and the statutes amendatory thereof, he "sold strong and spirituous liquors and wines in quantities of less than five gallons at a time, viz., one gill of brandy, one gill of whisky, one gill of gin, one gill of wine, one gill of alcohol, one gill of rum, one gill of ale, one gill of beer, without having a license therefor granted according to the provisions of said statutes, whereby defendant became indebted and liable to plaintiffs in the sum of fifty dollars forfeiture and penalty imposed by said statutes." On motion to make the complaint more definite and certain, or for a bill of particulars:

Held, that the complaint is framed under and according to the rules and requirements of the common law, and is sufficient, as against the objection, that the reference to the law under which this action is brought is indefinite and uncertain. As a common-law pleading it is sufficient that the complaint charges in due form and sufficient particularity the commission of the offense declared by the statute, with general reference to the law giving the right of action for the penalty.

An indorsement on the summons referring to the statute is not necessary where service of a copy of the complaint accompanies it.

Held, further, that the plaintiffs should either make the complaint more definite and certain by amendment, stating the name and names of the person to whom the sales charged therein were made, or serve on defendant's attorney a bill of particulars giving such information, or in case of inability to give the name and names of such persons, then by stating grounds for the omission.

Saratoga Special Term, August, 1883.

Kee *et al.* agt. McSweeney.

S. Brown, for plaintiffs.

W. G. Paris, for defendant.

BOCKES, *J.* — Motion for order requiring the plaintiffs to make the complaint more definite and certain, or for bill of particulars.

The action is brought to recover penalties for violation of the excise laws. The complaint contains twenty counts or separate causes of action, and a recovery is claimed for one penalty of fifty dollars under each count. The counts are alike in all respects, except as to the day on which the several offenses against the statute are alleged to have been committed. The first is charged to have been committed May 12, 1883, and the other offenses on each subsequent day to and including the thirty-first day of the same month. The claim for relief is stated in each count alike. Attention need be called therefore to the first count only in our consideration of the motion. It is there charged that the plaintiffs were overseers of the poor, &c., and that the defendant was on the 12th day of May, 1883, keeper and proprietor of a hotel known as the "Mansion House," in the town named; and on that day at said hotel, in violation of the provisions of chapter 628 of the Laws of 1857, and the statutes amendatory thereof, he "sold strong and spirituous liquors and wines in quantities less than five gallons at a time, viz., one gill of brandy, one gill of whisky, one gill of gin, one gill of wine, one gill of alcohol, one gill of rum, one gill of ale and one gill of beer, without having a license therefor granted according to the provisions of said statutes, whereby defendant became indebted and liable to plaintiffs in the sum of fifty dollars forfeiture and penalty imposed by said statutes."

The points made against the pleading are (1) that the particular section of chapter 628, giving the penalty claimed, is not definitely and specifically stated and pointed out; and (2) that the name (or particular description) of the person to

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whom the alleged sale was made is not given, nor is any reason or excuse given for such omission.

1. I think the first point of objection untenable. The complaint is framed under and according to the rules and requirements of the common law; not in debt as sometimes given by the statute for the recovery of penalties. It is sufficient as a common law pleading if it sets out a right of recovery under the law, stating all facts necessary to the offense for which the penalty is given, with a general reference to the statute. Section 1897 of the Code of Civil Procedure requires an indorsement on the summons referring to the statute, and, in some instances to the very section of the act, when service of a copy of the complaint does not accompany it. But this section has no application to a case like the present, where the complaint was served with the summons (4 *Denio*, 269). As a common law pleading it is sufficient that the complaint charges in due form and with sufficient particularity the commission of the offense declared by the statute, with general reference to the law giving the right of action for the penalty. I think the reference to the law under which the action is here brought sufficient against the suggestion that such reference is indefinite and uncertain. As regards this point urged by the defendant's counsel, I think the motion without ground of support.

2. The second ground of motion I think well sustained. I think the same rule should be applied in this case as would be applicable to cases of divorce for adultery and slander and kindred cases. In an action for divorce the party should state the name of the person with whom the alleged adultery was committed, or should give excuse for the omission so to do; and in slander the complaint should give the name of the person or the persons to whom or in whose presence the slanderous remark was uttered, or give the reason or excuse for the omission. In the case in hand a sale of strong and spirituous liquors and wines is alleged, but to whom the sale was made is not stated, nor is any reason or excuse for the omission given.

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And in each count, eight different and distinct sales are charged. Were these sales all to one person, or were they made to several? Should not the defendant be apprized as to which of these offenses the *one* penalty is claimed? Or must he go to trial and permit the plaintiff to then select his ground of action for some one offense not in the complaint specifically pointed out? Would not this give to the plaintiffs an undue advantage on the trial? It is an old and familiar rule of pleading that the party must state specifically and circumstantially the facts intended to be proved and on which he will rest his right of recovery. This has always been held to be but fair to his adversary, who may rightfully insist that he shall be apprized either by the averments of the complaint or by bill of particulars of the precise and individual offense (in case of suit for a penalty) charged against him (13 *Johns.*, 429; 4 *Johns.*, 194-198; 4 *Denio*, 463; 8 *How.*, 431; 11 *How.*, 408; 14 *Abb.* [*N. S.*], 262).

It will be seen on reference to the first case here cited that the plaintiff declared against the defendant for selling spirituous liquors by retail "to A. and B.," contrary to statute. Here the pleader deemed it necessary to name the persons to whom the sale was made. This case is of some value as a precedent on the point under examination. The same form of pleading seems to have been adopted in *Tiffany agt. Driggs* (13 *Johns.*, 253; see *statement of the case*). It is quite possible that the complaint is not demurrable because of the omission here complained of (*Blaisdell agt. Hewit*, 3 *Caines*, 138; see *statement of the case*). If so, however, the difficulty here suggested is not answered.

The question still remains, whether the defendant in this case, especially in view of the fact that each count contains an allegation as to eight separate sales, and that only one penalty is claimed in each count, is not entitled under the Code (*sec.* 546) to an order requiring the pleading to be made definite and certain in the particular or particulars above discussed, by amendment, or to a bill of particulars under section 531. I am of the

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opinion that this question should be answered in the affirmative. I think the defendant is entitled to be informed of the particular sale and sales counted on by the plaintiffs. The name of the person or persons to whom the sales were respectively made should be given, or if unable to give the name of such person or persons, this fact should be so averred with circumstances of sale sufficient to apprise the defendant of the true ground of action relied on (*Wood* agt. *Wood*, 2 *Paige*, 109). This requirement seems reasonable, to the end that the defendant may be enabled to meet the specific charge. It is suggested by the plaintiffs' counsel that the information demanded is all ready with the defendant, as he must know or has the means of knowledge whether the sale and sales counted on were or were not made, and he cites 1 *Barb.*, 30; 6 *Bos.*, 681; 7 *Jones & Spencer*, 482; 5 *Hun.*, 353-357; 18 *Hun.*, 406; also 59 *N. Y.*, 183, 63 *N. Y.*, 201.

An examination of these cases will show, I think, that they do not quite touch this case in view of the peculiarity of the averments of *sales* in the respective counts. I think the remarks of the chancellor in *Wood* agt. *Wood* (2 *Paige*, 113) applicable to this case (*See, also*, 10 *Abb. N. C.*, 479). The defendant is, as I think, entitled to have the charges against him specific and definite on paper. In this case he may not know—certainly he is not informed by the complaint—against what particular charge (sale) he will on the trial be held to make answer. If the sale and sales were made by his agent, he would not have personal knowledge, yet proof of sales by his agent or servant would conclude him on the trial.

I conclude, therefore, that the plaintiffs should either make the complaint more definite and certain by amendment as to the person and persons to whom the alleged sales were made, or serve a bill of particulars, giving the requisite information in that regard. If unable to give the name or names it should be so stated, with such circumstances as would identify, to some extent, the transaction counted on (*See order*).

No costs of motion.

Candee agt. Daying.

“ORDER.”

A motion having been made herein on an order to show cause for an order requiring the plaintiffs to make the complaint more definite and certain by amendment, or for a bill of particulars, as stated in said order to show cause, on reading the affidavit of the defendant, verified August 6, 1883, with said order to show cause attached, and on inspecting the complaint herein, and after hearing Mr. Paris for the motion and Mr. Brown opposed,

It is ordered, That the plaintiffs either make the complaint herein more definite and certain by amendment, by stating the name and names of the persons to whom the sales charged therein were made, or serve on defendant's attorneys a bill of particulars giving such information, or in case of inability to give the name and names of such persons, then by stating grounds for the omission, and the time to answer the complaint herein by the defendant is hereby extended for twenty days after the service of the amended complaint, or the bill of particulars, whichever the plaintiffs may elect to do.

No costs of motion allowed to either party.

Let this order be entered in Warren county.

N. Y. COMMON PLEAS.

CANDEE agt. DAYING.

Bills of particulars — When should contain itemized statement of credits as well as of debits — Code of Civil Procedure, section 531.

Under section 531 of the Code of Civil Procedure, in an action on an accounting for goods sold and delivered, a bill of particulars should contain an itemized statement of credits as well as debits.

Williams agt. *Shaw* (4 Abb. Pr., 209) disapproved of and the cases distinguished where the action is on account between the parties and where it is a claim of one party.

Special Term, March, 1884.

Marks agt. King.

BEACH, J. — Bills of particulars are of two kinds; one appertains to an account between parties, the other to a claim of one party. The rules governing the right to the one or other are different. *Giles* agt. *Betz* (15 *Abb. Pr.*, 285) refers to the latter, while *Williams* agt. *Shaw* (4 *Abb. Pr.*, 209) refers to the former, and is a special term decision. From the brief memorandum it seems to me the learned judge did not appreciate the difference between a bill of particulars of an account and one of a claim.

This action is to recover an indebtedness on an account for goods sold and delivered. Upon a demand, the plaintiff has furnished a bill of particulars of the account, itemizing only the debit side. In my opinion, an account should contain credits, if any, as well as debits. One class of items is no more a part of the account than the other (*Dowdney* agt. *Volkennig*, 37 *Sup. C. R.*, 313). The rule is different when the bill of particulars of a claim is ordered by the court.

Motion granted, ten dollars costs to abide event.

SUPREME COURT.

DAVID MARKS and another agt. MORRIS KING.

Motions and orders — County judge — Costs — Stay by non-payment — When begins — Code of Civil Procedure, sections 772, 779, 798.

A county judge can, under section 772 of the Code of Civil Procedure, *ex parte*, vacate an order previously made by him extending time to answer. The stay of proceedings provided for by section 779 of Code of Civil Procedure begins only from the default of the party in not paying the costs. If no time is specified in the order, then this default does not exist until ten days after the service of a copy of the order, and the proceedings, therefore, are not stayed until the ten days have elapsed. Under section 798, if the service is by mail, double the time is allowed. Does a stay of proceedings prevent the obtaining of further time to answer, *quære*.

Albany Special Term, February, 1884.

Marks agt. King.

THIS was an action in which a warrant of attachment had been issued against the defendant. The defendant thereupon moved to vacate the attachment, which motion was denied, with ten dollars costs, February 2, 1884, and the order was served on defendant by mail on that day. The defendant's time to answer expired February 10, 1884. On the eighth day of February, before paying the costs of motion, defendant obtained an order *ex parte* extending his time to answer twenty days from the county judge of Fulton county. Plaintiff thereupon obtained an *ex parte* order from the same judge vacating his previous order on February eleventh on the ground that defendant's proceedings were stayed under section 779 of the Code. After this order was granted defendant paid the costs of the motion, but the plaintiff entered judgment by default, as for failure to answer, on February thirteenth.

Motion by defendant to vacate last order of county judge and the judgment entered by plaintiff.

Henry A. Merrit and *N. H. Anibal*, for motion.

Mark Cohn, opposed.

LEARNED, *J.* — It is admitted that the county judge could *ex parte* vacate the extension of time which he had granted (*Code, sec. 772*), and therefore it is not very material on the present motion what were his reasons. I cannot review the order which he made. But as the matter has been discussed, and as the reason is plainly given both in the affidavit and in the order of the county judge why the former order was vacated, I may briefly state my views.

It seems to me very plain from the language of section 779 that the stay of proceedings thereby declared begins only from the default of the party in not paying the costs. If no time is specified in the order, then this default does not exist until ten days after service of a copy of the order. To construe the section to mean that a party's proceedings are instantly stayed

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from the very granting, or the very service of the order, would give him no time to comply with its requirements, and would be most unreasonable. The language of the section is plain, viz., that when the costs are not paid * * * within ten days after the service, &c., * * * all proceedings, &c., are stayed. The proceedings are not stayed, therefore, until the ten days have expired. Of course, under section 798, if the service is by mail double the time is allowed.

Three decisions are cited by the plaintiffs: *Thaule* agt. *Frost* (1 *Abb. N. C.*, 293); *Lyons* agt. *Murat* (54 *How. Pr.*, 23); *Seward* agt. *Wilson* (3 *Abb. N. C.*, 50). The last only applies. That was a decision, in 1877, of the special term New York common pleas. I think it incorrect and should refuse to follow it. The learned judge who decided it seems not to have considered the question now presented, and in passing I may say that I am not certain that a stay of proceedings prevents the obtaining of further time to answer. The plaintiffs, however, were regular in entering their judgment, because the county judge, as has been said, could vacate his order extending the time, and did so, hence the defendant can only ask to come in as a matter of favor. As he swears to merits, and as he has paid the ten dollars costs, it is reasonable that he should be allowed to come in on the usual terms. He must pay ten dollars costs of motion and fifteen dollars and fifty cents costs of judgment and clerk's fee, and upon such payment the default may be opened and the defendant allowed to answer. The costs to be paid and the answer served on or before March eighth. If not so paid, then the plaintiffs to have ten dollars costs of this motion.

Bearnès agt. Bearnès.

SUPREME COURT.

MARY BEARNES, as administratrix of the goods, &c., of
WILLIAM F. BEARNES, deceased, agt. JAMES S. BEARNES.

Judgment — Effect of — When party estopped from applying to court of equity to set aside judgment, because of fraud — Complaint — Demurrer.

The plaintiff, as administratrix, sued to recover \$3,500, claimed to have been wrongfully received by defendant as interest upon the foreclosure of a \$25,000 mortgage executed by the intestate, said sum being alleged to have been already paid to defendant for interest on said mortgage by the intestate in his lifetime. The complaint alleged that judgment of foreclosure and sale was duly entered and the premises afterwards duly sold by a referee duly appointed:

Held, that it follows from the allegations of the complaint, that in all these proceedings on foreclosure, the plaintiff's intestate had notice, and that the amount to which the defendant in this action and the plaintiff in the foreclosure action was entitled for principal and interest was directly in issue; and the defendant is entitled to judgment on demurrer to the complaint.

Special Term, February, 1884.

Barnum & Rebham, for defendant, in support of demurrer.

A. J. Rogers, for plaintiff.

LAWRENCE, *J.* — The complaint alleges that before the commencement of this action, William F. Bearnès died intestate, and that on the 11th of February, 1880, letters of administration upon his estate were duly issued to plaintiff by the surrogate of the county of New York; that she thereupon duly qualified and entered upon the duties of her office; that on the 15th day of December, 1867, said William F. Bearnès, for the purpose of securing to the defendant the payment of the sum of \$25,000, made, executed and delivered to him a bond, &c., whereby he bound himself in the penalty of \$50,000, conditioned that the same should be void if he, the said William F. Bearnès, should pay to the defendant the

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sum of \$25,000 on the 15th day of December, 1868, with interest at the rate of seven per cent per annum, and as collateral security for the payment of said indebtedness, he on the same day executed and delivered to the said defendant a mortgage on certain real property situated in the city of New York; that on or about the 26th day of January, 1870, there had accrued and become due upon the said bond interest thereon from the date of said bond, whereupon the said William F. Bearnès paid to the defendant \$3,516.11 for such interest, and the defendant duly acknowledged the receipt thereof by writing as follows:

“\$3,516.11.”

“NEW YORK, *January* 26, 1870.

“Received from Mr. William F. Bearnès \$3,561.11, as interest on his bond, due December 15, 1869, as per settlement had the above date.

(Signed) “JAMES S. BEARNES.”

[Revenue stamp,
two cents.]

On the eighth day of September the defendant commenced an action in the supreme court of the state of New York, in which action the defendant was plaintiff, and the said William F. Bearnès and Mary, his wife, were defendants, for the purpose of procuring a judgment of foreclosure of the mortgage given to secure the payment of the said bond and sale of said premises, in which action said defendant claimed and alleged that the sum of \$25,000, together with interest on said bond, was then due upon said bond and mortgage, and said complaint was duly verified by said James S. Bearnès; that such proceedings were had in said action; that on the 1st day of October, 1870, an order was made referring it to a referee to compute the amount due on said bond and mortgage; and said referee, after such computation, made and filed his report, finding that no payments had been made on said bond and mortgage, either for principal or interest, and that the sum of \$25,000, the principal, together with \$4,900 interest on said sum from December 15, 1867, was due the plaintiff. It is further

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alleged in the complaint that on the 31st of October, 1870, the judgment of foreclosure and sale was duly entered in said action, and the premises were afterwards duly sold by a referee duly appointed. By such judgment and upon such sale the sum of \$45,077 was realized; that thereafter the said referee paid to the said James S. Bearnes, or his attorneys, the sum of \$25,000 for principal, together with the sum of \$4,900 for interest on the said bond and mortgage from December 15, 1867; that at the time the said referee computed the amount due upon the said bond and mortgage the said James S. Bearnes, or his agent, appeared before the said referee and testified that no payments had been made on that sum, either for principal or interest, whereas the plaintiff alleges the fact to be that there had been paid to the said James S. Bearnes, for interest on said bond, as stated in paragraph two of this complaint, the sum of \$3,516.11, and that there was at the time of such computation before said referee only due to the said James S. Bearnes, for interest on said sum, the sum of \$1,383.80. It is then alleged that the defendant wrongfully received from said referee the sum of \$3,516.11, in excess of the amount due him, which sum belonged to William F. Bearnes, and had been theretofore paid by him to the defendant on January 26, 1870, and the plaintiff claims judgment for that amount, with interest from the 22d day of December, 1870, the date of the alleged receipt.

The defendant demurs to the complaint, on the ground that the same does not state facts sufficient to constitute a cause of action.

It was decided by the Court of Appeals in the case of *Ross* agt. *Wood* (70 N. Y., 9) that an equitable action cannot be maintained to annul a judgment rendered upon conflicting evidence, upon the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury and fraud, and that the judgment was obtained by false evidence. Also, that a fraud, which will justify equitable interference in setting aside a judgment or decree, must be

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actual and positive, not merely constructive; that it must be fraud occurring in the concoction or procurement of the judgment or decree, which was not known to the party at the time, and for not knowing which he is not chargeable with negligence.

In the case of the *New York Elevated Railroad Company* agt. *Harrold* (65 How. Pr., 90, recently reported as the *New York Central Railroad Co.* agt. *Harrold*) it was held that "where it appears that the same matter has been actually tried, or so in issue that it might have been tried, the party is estopped from applying to a court of equity to set aside the judgment because of fraud, for the reason that the judgment is the highest evidence and cannot be contradicted. In this case the learned justice who delivered the opinion of the court cited the cases of *Grum* agt. *Grum* (2 Gray, 361) and the *United States* agt. *Throckmorton* (98 U. S., 61).

The decisions in the cases just referred to must, I think, be regarded as decisive in favor of the plaintiff on this demurrer. It is not charged in the complaint that there was any conspiracy on the part of the defendant or his agent to swear falsely or to procure a judgment by means of perjured testimony. It is admitted and alleged that the judgment was rendered after the defendant or his agent had appeared and testified as to the amount due upon the bond and mortgage; that the said judgment was duly entered and that the premises were afterwards duly sold by a referee duly appointed. If the judgment was duly entered, the premises duly sold and the referee duly appointed, it follows as a natural conclusion that of all these proceedings the plaintiff's intestate had notice. The question as to what was the amount due upon the bond for principal and interest arose directly in the case, and the complaint admits that it was claimed and alleged that the sum of \$25,000, together with interest on said bond from the 15th day of December, 1867, was then due upon the said bond and mortgage. It is, therefore, quite evident that the amount to which the defendant in this action and the

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plaintiff in that action was entitled for principal and interest was directly in issue.

This case I think, therefore, falls within the principle laid down in the cases above cited. If the whole amount of interest claimed by the plaintiff in that action was not due from the present plaintiff's intestate, that was a fact which was known to the intestate at that time. If he had received the receipt set forth in the complaint, bearing date January 26, 1870, acknowledging the payment of interest upon the bond up to December 15, 1869, he must have been aware of that fact on the 8th day of September, 1870, when the defendant commenced the action to foreclose his mortgage, claiming the full amount of interest upon said bond. If the interest had been paid it was clearly the duty of the plaintiff's intestate to have set it up; and if he knew the fact, as the receipt set forth in the complaint would indicate, that the claim for interest in the foreclosure suit was excessive, he was chargeable with negligence for not stating it (*See Ross agt. Wood, 70 N. Y., 9, and cases cited on page 11*).

There is no force in the point made by the learned counsel for the plaintiff that it does not appear on the face of the complaint that the defendant may not have been served with the process or papers in the foreclosure suit. The fourth paragraph of the complaint, as we have before seen, alleges the commencement of an action in the supreme court of this state, in which the defendant was plaintiff and the said William F. Bearnès and Mary, his wife, were defendants; and the fifth paragraph alleges that on the 3d day of October, 1870, judgment was duly entered in said action and the premises were afterwards duly sold by a referee duly appointed by said judgment, &c.

It would appear from this statement in the complaint that Bearnès and his wife were the only defendants in that action. An action cannot be commenced nor judgment rendered until process has been served upon the defendants; and where it is admitted that the action was commenced and the judgment

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duly entered it is too late to claim that the defendants had not been served.

For these reasons I am of the opinion that the defendant was entitled to judgment upon the demurrer, with costs.

SUPREME COURT.

In the Matter of the Application of JAMES A. DEANE for a peremptory *mandamus* agt. THE BOARD OF SUPERVISORS OF GREENE COUNTY.

Mandamus — When will not issue to compel the board of supervisors to cancel the audit of services to a *de facto* coroner.

Where a board of supervisors acting as county canvassers decided that K. and not G. had been elected coroner of Greene county, and gave to him the certificate of election, and K. entered upon and performed the duties of such office until ousted from office by judgment of this court in action by the *People ex rel. G.*, to recover possession of the office, K. presented a bill to the supervisors for services and disbursements as coroner, properly verified, which the board audited and incorporated the amount thereof in the tax levy, and issued a certificate to K. for such amount, which was by him assigned to a *bona fide* holder, for value, previous to the institution of this proceeding, which seeks to compel the board to cancel the audit and allowance:

Held, that the *mandamus* asked for should be refused for the following reasons:

First. The board of supervisors by awarding to K. the certificate of election as coroner, authorized and empowered him to act as such, and as such services were valuable and legal, there is no impropriety or illegality in their audit or payment.

Second. As G. cannot obtain an allowance of the same bill from the county, but his remedy, if any he has, is against K., there is no property nor money of the county to be wasted, which gives the relator, as a taxpayer, any standing to maintain the proceedings.

Third. If the audit to K. is illegal it can be reviewed by *certiorari*, or an action brought to recover the money paid thereon, when paid.

Fourth. As the certificate was issued in good faith to K. and was assigned to a *bona fide* holder, for value, before this proceeding was instituted as against such *bona fide* holder, the county is remediless.

Special Term, January, 1884.

Matter of Deane agt. Board of Supervisors of Greene County.

MOTION for a *mandamus* to compel the supervisors to cancel the audit of services to a *de facto* coroner.

Griswold & Cornell, for motion.

Werner & Chase, opposed.

WESTBROOK, J. — Want of time prevents the preparation of a formal opinion, and I content myself with this memorandum.

The facts are as follows: The board of supervisors of Greene county, acting as county canvassers, at its annual meeting in 1882, decided that William Kortz, and not Andrew H. Getty, had been elected coroner of Greene county, and gave to him the certificate of election. In reaching the conclusion that Kortz and not Getty was chosen, the board refused to count and allow to Getty certain ballots on which his name was printed with a different middle letter, on the ground that it had no power to go back of the ballot to ascertain the intent of the voters. The supreme court, both at special and general terms, confirmed the action of the board by refusing a *mandamus* to compel it to count for Getty the ballots printing his name with a wrong middle letter. (This action of the supreme court is not set out in the motion papers, but the court takes judicial cognizance of its own proceedings.) Kortz acted as coroner in good faith, and performed services as such until November 13, 1883, when he was ousted from office by the judgment in the action brought in this court by the people and Andrew H. Getty against him to recover possession of the office. For services in the office of coroner and disbursements in rendering such services, all of which were rendered and disbursed previous to the judgment of ouster, Kortz presented a bill properly verified, to the supervisors of Greene county, at its annual session in 1883, for audit and allowance. It was audited and allowed by the board in good faith, the amount thereof incorporated in the tax levy, and a certificate duly issued to Kortz for the amount thereof, which had

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been assigned to a *bona fide* holder for value, previous to the initiation of this proceeding, which seeks to compel the board to cancel the audit and allowance. The *mandamus* asked is refused for the following reasons: 1st. The board of supervisors of Greene county, by awarding to Kortz the certificate of election as coroner, authorized and empowered him to act as such; and as such services were valuable and legal, there is no impropriety or illegality in their audit or payment. It is possible (but on that point no definite opinion is expressed) that under section 1953 of the Code of Civil Procedure, Getty may recover from Kortz the fees and perquisites of the office covered by and included in the audit, but it is clear that Getty, who did not render the services nor disburse the money, could not obtain payment therefor from the county, nor could he truly swear, which he must do to obtain the allowance, that he had rendered the services and made the disbursements. The granting of the *mandamus* would therefore exempt the county from payment for lawful services of which it had the full benefit. 2d. As Getty cannot obtain an allowance of the same bill from the county, but his remedy, if any he has, is against Kortz, there is no property nor money of the county to be wasted, which gives the relator, as a taxpayer, any standing to maintain the proceeding. 3d. If the audit to Kortz is illegal it can be reviewed by *certiorari*, or an action brought to recover the money paid thereon, when paid. 4th. A certificate was issued in good faith to Kortz and was assigned to a *bona fide* holder for value, before this proceeding was initiated, and as against such *bona fide* holder for value of the certificate, the county is remediless (*People agt. Fitzgerald*, 54 How., 1); and 5th. The exercise of a sound discretion forbids its issue.

As the proceeding was instituted in good faith, and presents a new and reasonable question for adjudication, in which the relator has no greater personal interest than any other taxpayer of Greene county, the application for a *mandamus* is denied, without costs. •

Michenfelder agt. Gunther.

NEW YORK CITY COURT.

CHARLES MICHENFELDER agt. MAGDALENA GUNTHER.

Summary proceedings—Landlord and tenant—When widow of a tenant is, prima facie, assignee of the term and may be removed as an overholding tenant.

Where a tenant under a yearly hiring dies leaving his widow in possession of the premises, and she remains in occupation during the unexpired term, and there is no administration upon the estate, she is, *prima facie*, an assignee of the term and may be removed as an overholding tenant under the statute relating to summary proceedings.

General Term, February, 1884.

Before McADAM, C. J., HYATT and HALL, JJ.

APPEAL from a judgment rendered in a summary proceeding under which the tenant was removed, &c.

Jacob Levy, for appellants.

E. P. Trautman, for respondents.

McADAM, C. J.—The petition alleges and the proofs show that the conventional relation of landlord and tenant existed between Eva Michenfelder as landlord and John Gunther as tenant, in respect to the premises in question; that the tenancy was from year to year from April 1, 1879; that the petitioner has since succeeded to the estate of the said landlord with the right to maintain all legal proceedings in respect to the possession of said premises; that the tenant, John Gunther, continued in possession under this yearly hiring until February or March, 1883, when he died, leaving his widow (the party proceeded against) in possession. The last yearly hiring expired a short time thereafter, to wit, April 1, 1883. It does not appear that letters testamentary or of administration upon the estate of the tenant were ever issued so as to vest in such

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representative the title to the tenant's unexpired term. It does appear, however that the widow remained in possession after the decease of her husband, and that she enjoyed the full benefit of the unexpired term. She entered into possession with him, and she remained in possession of the premises after his death. Under such circumstances she became *prima facie* the assignee of the term and her continued possession was presumably lawful.

The relation of landlord and tenant having been once established, it attached to all who succeeded in the possession immediately or remotely. The right to the possession and the term of the tenant ceased prior to the commencement of these proceedings. The conventional relation of landlord and tenant having been formed by agreement, and the right to invoke the statutory remedy by summary proceedings (if necessary), having once attached, the death of the tenant did not destroy the applicability of the remedy (*The People* agt. *Tead*, 33 *How. Pr.*, 238). The statute is a remedial one and ought to be liberally construed to advance the remedy which the legislature has furnished to remove defaulting and over-holding tenants. If the lease had been for a long term and the tenant's interest therein valuable, a different question might perhaps have arisen, but in the present instance the widow took herself and enjoyed the entire unexpired term of the lease, and she may, in view of this fact, be holden as assignee of the term. Even an administration who enters and takes the rents and profits of demised premises is personally liable as assignee of the term for all rents falling due after his entry (*Matter of Galloway*, 21 *Wend.*, 32; *Fisher* agt. *Fisher*, 1 *Bradf.*, 337; *Rubery* agt. *Stevens*, 4 *Barn. & Adol.*, 241; *Buckley* agt. *Pertt*, 1 *Salk.*, 317; *Hargrave's case*, 5 *Coke*, 31; *Wentworth on Executors*, 32).

We have examined the case relied upon by the tenant (*Benjamin* agt. *Benjamin*, 5 *N. Y.*, 383), but have failed to discover that it controls the disposition of this appeal. It states several elementary principles which we approve, and

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holds that in that particular case no relation of landlord and tenant existed, but there is a wide difference between the facts pleaded in the petition there and the facts alleged in the petition here, and it was the peculiar facts alleged there that led the court to hold that the relation of landlord and tenant existed. The main questions in that case, after all, was whether the tenant was not entitled to a trial by jury and whether a trial without one was not illegal. The court sustained the tenant's objection in regard to the right of trial by jury, and it was scarcely necessary for it to have decided anything else. We have examined the record and are satisfied that the justice had jurisdiction; that no errors were committed upon the trial; that no injustice had been done, and that the judgment appealed from should be affirmed, with costs.

N. Y. COMMON PLEAS.

HENRY MEIGS *et al.* agt. CHAS. FREMONT WILLIS, WILLIAM N. THOMPSON *et al.*

Mortgage foreclosure — Questions which cannot be settled in, but must be tried by a jury.

Where, in an action to foreclose a mortgage given by A., a denial is interposed by B., who is joined with A. as defendant, that his title or interest is subordinate to that of plaintiffs, as alleged, and he claims possession by a title paramount and adverse to them, the complaint should be dismissed as to B., as the right of possession between A. and B. cannot be settled in a foreclosure action, but must be tried by a jury.

Special Term, March, 1884.

THE plaintiffs brought this action to foreclose a mortgage given to them by defendant Willis, July 28, 1882, to secure the sum of \$5,000. The complaint averred upon information and belief, that the defendant Thompson had or claimed to have some interest in or lien upon the mortgaged premises,

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which interest or lien, if any, had accrued subsequently to the lien of said mortgage, or was subject thereto.

Thompson by his answer denied that his interest was subordinate to the plaintiffs or their mortgagor, and averred that he held and claimed possession of the premises by a title paramount and adverse to them. He asked for affirmative relief establishing his claim, and that the mortgage, which is a cloud upon his title, be surrendered and canceled of record.

At the opening of the case objection was made that by the pleadings an action in ejectment was presented which could only be tried by a jury.

The counsel for Thompson offered to waive this objection and proceed with the trial before the court. This proposition was not accepted by the defendant Willis.

Both parties then proved their chain of title, and the case was submitted after argument upon the pleadings and proofs.

Alfred Roe, for plaintiffs.

William A. Beach, for defendant Willis.

John E. Parsons, for defendant Thompson.

LARREMORE, *J.* — The only break that appeared in Thompson's title was the absence of a deed of the premises from Dudley Selden, the admitted fountain head of title, to Andrew McGown. But a recital of the existence of that deed is contained in the deed given by McGown to Patterson, March 1, 1828, and this, it is claimed, as to an ancient document, was sufficient notice within the rulings in *Carver agt. Jackson* (4 *Peters*, 83). No other proof was offered of the existence and loss of the deed, and it is at least a matter of serious doubt whether Willis, who does not claim under Patterson, and who is a stranger to his record title, is bound by it.

This question, however, is unimportant, in view of the ultimate disposition to be made of this case. The plaintiffs, as mortgagees, cannot maintain ejectment (*Code Civil Pro.*, *sec.*

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1498; *Holcomb* agt. *Holcomb*, 2 Barb. S. C., 20). As between the defendants Willis and Thompson, the right of possession to the premises cannot be settled in this action, but must be tried by a jury. Even if this objection did not exist, the defendant Willis has no right to insist upon a final disposition of his claim, for it does not appear that a copy of his answer has been served upon the attorney for the defendant Thompson, in pursuance of section 521 of the Code of Civil Procedure.

Judgment is therefore ordered that as to the defendant Thompson the complaint be dismissed, and that as against the other defendants the plaintiffs are entitled to a foreclosure and sale of the mortgage premises.

SUPREME COURT.

FRANCIS K. McCULLY *et al.*, as executors, &c., of THOMAS B. PENNIE, impleaded, agt. ELIZABETH A. HELLER *et al.* (WALTER BELL, purchaser).

Service of summons on non-resident — Verified copy of complaint need not be presented to the judge to give him jurisdiction to grant order for publication — When summons and complaint need not be mailed — When omission of the words "without the state" from the notice does not render service void — Clerical error not sufficient to vitiate the service — Code of Civil Procedure, sections 439, 440.

Since the amendment of 1879, of section 439 of the Code of Civil Procedure, providing for order for publication of summons to be served on a non-resident defendant, the actual presentation of the particular verified complaint to the judge is unnecessary. Where there is a verified complaint on file in the county clerk's office and the affidavit presented for the order of publication sets forth such fact and annexes a copy thereof it is sufficient.

A clerical error in the order of publication, *i. e.*, mistake in the first name of one of the defendants, "Albert instead of Alfred," where the affidavits and the copies of order also summons and notice served on defendant contain the correct name, is not sufficient to vitiate the service.

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Nor is the omission of the words "without the state" from the notice sufficient to render the service void.

When the summons and complaint are served on the defendants personally, without the state, a copy need not be mailed to them.

Kings County, Special Term, March, 1884.

THE action was brought to foreclose a mortgage. Mary G. Pennie and Alfred N. Pennie each owned one undivided sixth part of the premises subject to the mortgage. Mary G. Pennie was an infant of the age of sixteen years and Alfred N. Pennie an infant of the age of fourteen years. Both resided in Pennsylvania. On October 5, 1883, an order was made for service of the summons and complaint on said defendants by publication. The order recited that it was made on a copy of the verified complaint. The accompanying affidavit stated that the verified complaint was on file. The summons and complaint were served on the defendants personally without the state. No copy of the summons, complaint or order was mailed to them. The notice attached to the summons omitted the words "without the state." In the caption of the order the defendant Alfred was correctly described. In the body of the order he was designated as Albert. On the 27th of November, 1883, the defendants petitioned for the appointment of a guardian *ad litem*, who appeared for them in the action after such appointment. Upon a sale the purchaser objected to the title and moved to be relieved from his purchase.

Joseph A. Burr, Jr., for Walter Bell, purchaser, for motion :

I. The court had no jurisdiction to appoint a guardian *ad litem* in a foreclosure action before service of summons, whether the infant was under or over fourteen, and whether he applies in his own behalf or not (*Ingersoll* agt. *Mangam*, 84 N. Y., 622).

II. If the verified complaint is not presented to the judge granting the order of publication, there is no jurisdiction to grant it and service under it is void (*Code of Civil Pro.*, sec.

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439; *Ladd* agt. *Terra Haute U. and M. Co.*, 13 *Weekly Dig.*, 209; *Luther* agt. *Brison*, 4 *Mo. Law Bull.*, 91; *Orvis* agt. *Goldschmidt*, 64 *How. Pr.*, 71; *Williamson* agt. *Williamson*, 64 *How. Pr.*, 450).

III. The omission of the words "without the state" from the notice rendered the service void (*Lafarge* agt. *Mitchell*, 4 *Mo. Law Bull.*, 36).

IV. The defendant Alfred N. Pennie was not named in the order (*Code of Civil Pro.*, sec. 440).

V. The summons, complaint, &c., should have been mailed (*Ritten* agt. *Griffith*, 16 *Hun.*, 456).

George V. Brown, for plaintiff, opposed :

I. If there was any defects the voluntary appearance of the infants by their guardian conferred jurisdiction.

CULLEN, *J.* — I think there was a valid service of the summons on the infant defendants, and therefore it is unnecessary to pass upon the effect of their appearance by guardian. The Code in 1879 was amended so that instead of requiring that the plaintiff "must present to the judge a verified complaint," it now provides that the order of publication "must be founded upon a verified complaint." To give any effect to this amendment it must be that the actual presentation of the particular verified complaint is unnecessary. In this case there was a verified complaint on file in the county clerk's office. The affidavit presented for the order of publication set forth such fact and annexed a copy thereof. I think an order made on such affidavit and copy is certainly "founded" on the verified complaint.

The mistake in the first name of one of the defendants, found in the order of publication, that is, "Albert" instead of Alfred," I think is not material. The affidavit and the caption of the order contain the correct name; so do the summons and notice served on the defendant. I do not think clerical error sufficient to vitiate the service. The same is

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true of the omission of the words "without the state" in the notice attached to the summons.

There remains to be considered the objection that a copy of the summons and complaint was not sent to the defendants by mail in addition to the personal service made upon them. Were it not for the opinion delivered in *Ritten* agt. *Griffith* (16 Hun, 455), I should think it clear that the mailing was unnecessary. But the remarks on this point found in the opinion are *obiter*, and therefore not authoritative. The section of the Code provides for publication of the summons, or in lieu thereof personal service of the summons, complaint and order on the defendant out of the state. The order must further direct that on or before the day of the first publication a copy of the summons, complaint and order must be sent to defendant by mail. There is no provision that such copies shall be sent before personal service, and in the case of personal service it is not possible to mail the copies before the first publication, because there is no publication. It is true that is reading the statute closely according to its mere words, and I admit should not prevail were there anything in the spirit or object of the section of the Code requiring a contrary construction to be given to it. But I think there is not. The object of sending the copies by mail is that such copies may reach the defendant. But why serve a copy in that manner, when it has already been served or is to be served upon the defendant personally. What is to be attained by such double service? Secondly, there is this distinction between service by publication and personal service out of the state that make the provision as to sending copies by mail applicable in the first case, though unnecessary in the second. In the case of publication, only the summons and notice is published. The defendant who reads the publication is apprized that an action has been instituted against him and of the parties to that action, but not as to the particular claim. Therefore, the complaint is to be mailed to him to give such information. But in the case of personal service out

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of the state, the copy, complaint and order must be served. Personal service out of the state is more than publication, because if only what is published, *i. e.*, the summons and notice, was served personally, the service would be a nullity. I think neither the spirit of the Code nor its language requires transmission by mail in this case.

Motion denied.

SUPREME COURT.

HANNAH E. THISTLE *et al.* agt. EDWARD THISTLE *et al.*

Non-resident infant defendant — Summons how served — Effect of voluntary appearance — Effect of insertion of the words "by publication" instead of the words "without the state of New York" in notice indorsed upon summons — Bond of guardian ad litem of infant defendant, to whom to be made — Code of Civil Procedure, sections 440, 443, 1536.

The bond of a guardian *ad litem* of an infant defendant in partition may be made direct to the infant instead of to the people of the state, provided the order appointing the guardian so direct (*Sec. 1596, Code*).

Service of a summons upon a non-resident infant defendant in partition not necessary, provided the infant voluntarily appear in the action by its guardian *ad litem* (*Sec. 440, Code, construed*).

The insertion of the words "by publication" instead of the words "without the state of New York," in the notice indorsed upon the summons served personally without the state, under an order of publication, is not a valid objection to title—it is not jurisdictional (*Sec. 443, Code*).

N. Y. Chambers, February, 1884.

THE action was brought for the partition and sale of certain real estate situate in the city of New York. One of the defendants is an infant of the age of two years and a non-resident of the state. Service of the summons was made upon said infant personally without the state under an order of publication. Said infant appeared in the action by a guardian *ad litem*, duly appointed, and answered the complaint.

Thistle *et al.* agt. Thistle *et al.*

The premises were sold in three parcels, January 8, 1884, for \$30,850. The purchasers objected to the title and moved to vacate the judgment of sale, and that they be discharged, &c., on the following grounds, viz. :

1. That the bond of the guardian *ad litem* of one of the infant defendants was defective, in that said bond was given to the infant instead of to the people of the state of New York.

2. That under section 440 of the Code personal service could not be made without the State under an order of publication upon an infant under the age of fourteen years.

3. That the notice indorsed upon the summons served upon said infant was not the notice required by section 443 of the Code.

Shaw & Clark, for plaintiff.

John Hardy, Thomas H. Cook and Richard J. Lewis, for purchasers.

DOXOHUE, *J* — The sole object of service is to procure the appearance of the party. Where, as in this case, the infant has, on the application of its own voluntary representation appeared, that is sufficient; the intent of the case being that the infant should have its day in court, and the infant has had it here. How the service was made is of no importance, as the appearance is not dependent on that.

Objections overruled and motion to be discharged denied, with ten dollars costs.

Smith *et al.* agt. Keepers.

SUPREME COURT.

ALFRED H. SMITH *et al.* agt. JOSEPH KEEPERS, JR.

Preference — Right to — Court has an inherent right to control its own calendar — Code of Civil Procedure, sections 791, 793 — Rule 36.

Where, as in this case while the fact does not appear upon the pleadings, that an order of arrest has been granted, it is apparent that the action is one in which such an order can be issued as a matter of right upon a proper application to the court, even within the provisions of section 793 it may fairly be said that the right to the preference depends upon facts appearing in the pleadings, upon which the cause is to be tried and heard, and therefore that service of a notice of a trial before making the application for a preference does not deprive the defendant of the right to such preference under the rules of practice of the court.

An inherent right to control its own calendar is vested in the court independent of all other considerations (*Robertson agt. Schellass*, 62 *How.*, 489, and *City National Bank of Dallas agt. National Park Bank*, 62 *How.*, 495, distinguished).

N. Y. Chambers, 1884.

THIS is a motion to advance a cause and place it upon the circuit calendar of preferred causes for trial under Rule 36 of the General Rules of Practice, upon the ground that the defendant is imprisoned under an order of arrest and unable to obtain bail.

The action is brought to recover damages for the wrongful conversion of personal property, and the order of arrest was granted under subdivision 2 of section 549 of the Code of Civil Procedure.

Nothing appears by the pleadings upon which a preference could be given. Prior to the service of the notice of this motion, defendant served a notice of trial for the April circuit.

J. Newton Williams, for motion. The defendant is in actual custody and unable to obtain bail. Rule 36 gives this case a right to a preference. Nothing in the Code conflicts with defendant's right under the rule. The object of

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the rule is to relieve imprisoned defendants from long confinement, because of the crowded condition of the general calendar.

Charles G. Cronin, opposed. There is nothing in the pleadings going to show that this cause is entitled to a preference, and therefore the provisions of section 793 apply, and defendant having served a notice of trial without the order of preference, has waived his right thereto under Rule 36. Where the right to a preference depends upon facts which do not appear upon the pleadings, a copy of the order granting a preference must be served with or before the notice of trial (*Robertson agt. Schelhass*, 62 How., 489; *City Nat. Bank of Dallas agt. Nat. Park Bank*, 62 How., 495).

LAWRENCE, *J*—Subdivision 2 of section 549 of the Code of Civil Procedure authorizes an order of arrest in an action brought for the conversion of personal property. This is an action to recover damages alleged to have been sustained by the wrongful conversion of personal property. Section 791 of the Code of Civil Procedure provides that civil actions are entitled to preference among themselves in the trial or hearing thereof in the following order next after causes specified in the last section but one. * * * Subdivision 10. "A cause entitled to preference by the general rules of practice or by the special order of the court in the particular case." Rule 36 provides that whenever in any action an issue shall have been joined, if the defendant be imprisoned under an order of arrest in the action, or if the property of the defendant be held under attachment, the action shall be placed on the preferred calendar. In this case the defendant is actually imprisoned under an order of arrest and is unable to procure bail. A motion is made to place the cause on the preferred calendar. It is insisted that the court is precluded from making an order of preference by the provisions of section 793 of the Code, for the reason that

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the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, and that a notice of trial was served before the notice of motion, and the cases of *Robertson* agt. *Schellass* (62 *How. Pr. Rep.*, 489) and *City National Bank* agt. *National Park Bank* (62 *How. Pr. Rep.*, 495), are cited as authorities for this position. In each of these cases it was clear that the facts which authorized the preference did not appear upon the face of the pleadings, and a notice of trial having been served before the order was obtained, it was properly held, under section 793 of the Code, that the right to claim a preference was gone. I do not, however, understand that by section 793 I am prohibited from granting a preference in a particular case, where it is apparent that great hardship and injustice might ensue in case such preference was not allowed. The tenth subdivision of section 791 seems to recognize the power of the court to grant an order giving a preference in a particular case. In this case while the fact does not appear upon the pleadings that an order of arrest has been granted, it is apparent that the action is one in which such an order can be issued as matter of right upon a proper application to the court. I think therefore that even within the provisions of section 793, it may fairly be said that the right to the preference depends upon facts appearing in the pleadings upon which the cause is to be tried and heard, and that therefore the service of a notice of trial before making the application for a preference does not deprive the defendant of the right to such preference under the rules of practice of the court. Furthermore it is shown that the defendant has withdrawn his notice of trial, so that if the service thereof precluded him from making the motion, that obstacle has been removed, and section 793 has no application to the case. Independently, however, of all other considerations, the court has an inherent power to control its own calendar, and on that ground alone I should feel justified in granting the order which is asked for in this case.

Motion granted.

Schmidt agt. Couperthwait *et al.*

N. Y. COMMON PLEAS.

FAUSTINE SCHMIDT, plaintiff and appellant, agt. BERNARD M. COUPERTHWAIT *et al.*, defendants and respondents.

Appeal from order of general term of city court reversing judgment upon verdict of jury — What questions come up for review — Conditional sale — Modification by parol — What amounts to a valid extension.

Where no motion is made for a new trial and no appeal is taken from the order denying the same, the only questions coming up for review are those presented by the exceptions taken upon the trial.

The time for the payment of money or for the performance of a written agreement may be extended by parol.

What amounts to a valid extension.

General Term, March, 1884.

Before DALY, C. J., LARREMORE and BEACH, JJ.

APPEAL from an order of the general term of the city court, reversing a judgment entered upon a verdict rendered by a jury upon a trial had before Mr. justice McADAM. The facts are as follows :

On August 31, 1881, the defendants, by an instrument of that date, leased to the plaintiff certain articles of household furniture for seventeen and a half months at a reserved rent of \$184.20, payable as follows: Thirty dollars in cash, receipt of which was acknowledged, and the balance, \$154.20, in payments of nine dollars on the last day of each and every month thereafter during the term of the lease. In case of default in such payment, the defendants reserved the right to take and repossess said furniture, and retain all moneys received by them as liquidated damages. It was further provided by said lease that if at any time during its term or at its expiration, the plaintiff should desire to purchase the furniture the defendants would sell the same to her upon the payment of

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such sum as would with previous payments of hire amount to the sum of \$184.20, and that no title thereto should rest in the plaintiff until said last named sum should be fully paid.

The plaintiff took possession of the property, but in May, 1882, the defendants claimed possession of it on account of default in the payment of hire.

At plaintiff's request Earnest Daniels, on May 22, 1882, saw the defendant M. B. Cowperthwait, who agreed to except Daniels' personal responsibility for a weekly payment of two dollars every Monday, and that there would be no trouble about the goods.

On May 27, 1883, and previous to the Monday upon which the first weekly payment of two dollars was due, the defendants took possession of and removed the property.

The plaintiff sued for its recovery and damages and obtained a verdict in her favor, which was set aside by the general term and a new trial ordered in the action, from which order the plaintiff appeals.

M. L. Marks, for plaintiffs and appellant.

John A. Taylor, for defendant and respondents.

LARREMORE, *J.* — As there was no motion made in the court below for a new trial upon the judge's minutes, and no appeal from an order denying the same, the only questions coming up for review are those presented by the exceptions taken upon the trial.

A careful examination of the case has satisfied me that the only exceptions entitled to consideration are those taken upon the refusal to nonsuit, and to direct a verdict for the defendant. They all point in one direction — the modification of the original agreement. If this had no legal effect, then the plaintiff had no right of action, for she did attempt to show that on May 22, 1882, she had made all the payments according to the terms of the lease.

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But some significance must be attached to the transaction between the defendant, M. B. Cowperthwait, and the witness Daniels on May 22, 1882.

It was there claimed by the defendants that plaintiff was in default and had forfeited her right to the property. Daniels acted as her agent, and upon his representation that two dollars should be paid every week (commencing the next Monday) until the thing was settled, Cowperthwait said: "You speak like a man; I will do it. There is a small amount due, but I will speak about it; you come here every Monday and pay two dollars, I will not speak further about it." And further, at folio 75: "You have my word for it; that is enough. You come here every Monday and pay two dollars and there will be no trouble about the goods."

This testimony is undisputed, and was a complete answer to the motions for a nonsuit and for the direction of a verdict. The time of the payment of money provided for by a written instrument may be extended by parol (*Burt agt. Saxton*, 1 Hun, 551).

The defendants agreed to wait until May 29, 1882, for a first payment upon plaintiff's existing indebtedness, and their forbearance was a sufficient consideration to support the agreement which Daniels' testimony went to establish.

Without notice to plaintiff, who relied upon the representations made, they took possession of and removed the property two days before the time fixed for the first payment.

Under all the circumstances, I think the case was properly submitted to the jury; that the order appealed from should be reversed and the judgment of the trial term affirmed, with costs.

DALY, C. J. (concurring).—I agree with judge LARREMORE that the judgment of the general term of the court below should be reversed, and that of the trial term affirmed.

The general term, in the opinion delivered, say that they have been unable to discover any binding validity in law in

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the agreement with Daniels. What that agreement was has been stated in the opinion of judge LARREMORE. It was an oral agreement made by Daniels with the defendant to extend the time of payment fixed by the written agreement, and it has long been settled that, in a case of simple contracts, the time of performance in a written instrument may be enlarged by parol (*Keating agt. Price*, 1 *Johns. Ca.* 22; *Fleming agt. Gilbert*, 3 *Johns. R.*, 528; *Erwin agt. Saunders*, 1 *Cow.*, 249; *Frosh agt. Everett*, 5 *id.*, 498; *Blood agt. Goodrich*, 9 *Wend.*, 68; *Clark agt. Dales*, 20 *Barb.*, 64).

Even in agreements under seal after there has been a breach in the agreement, they may be modified in respect or entirely rescinded by an executed parol agreement founded upon sufficient consideration (*Dodge agt. Crandle*, 30 *N. Y.*, 307). In some of the cases it has been held that no new consideration is necessary to give validity to an agreement to extend the time of performance, the waiver being sufficient (*Clark agt. Dales*, *supra*). But in the present case there was, as judge LARREMORE has pointed out, a sufficient consideration for the parol agreement, the consideration being mutual.

The defendant had the benefit of the engagement of Daniels, that he would every Monday morning pay the defendant two dollars until the residue of the purchase money was paid; and as a consideration for that promise, he had the defendants' reciprocal promise that the time for performance should be extended by the payment of two dollars every week until the whole sum was paid.

So far as respects this modification of the plaintiff's written agreement, Daniels had authority from her to make it. He testifies that she told him that she would be satisfied with any arrangement he should make with the defendant, and he made this oral agreement extending the time of performance. The general term have not pointed out in what respect it was invalid.

In the *per curiam* opinion delivered, the judges say that they have been unable to discover in the agreement any bidding

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validity in the law, and we are equally unable to see upon what grounds it can be held to be void.

BEACH, J., concurred upon the ground of Daniels' agreement being an original undertaking and valid.

N. Y. COMMON PLEAS.

THOMAS C. LYMAN *et al.*, appellants, agt. PETER BOWE, as sheriff, &c., respondent.

Chattel mortgage— When mortgagor has such an interest in the mortgaged property as may be levied upon and sold.

Where a chattel mortgage gives to the mortgagor a right of possession till the payment of the mortgage debt be demanded, he has an interest in the mortgaged property that may be levied upon and sold.

General Term, March, 1884.

E. D. McCarthy, for appellants.

Charles F. McLean, for respondent.

BEACH, J.— The chattel mortgages were conditioned for the payment of certain moneys on demand. No demand had been made on the mortgagors, and the respondent levied upon the property while in their possession. The interest of mortgagors having a right to redeem, and a right to the possession of the mortgaged property for a definite period, has been many times adjudicated to be subject to levy and sale on execution (*Mattison* agt. *Baucus*, 1 *N. Y. R.*, 295; *Hall* agt. *Simpson*, 19 *How. Pr.*, 481; *Farrell* agt. *Hildreth*, 38 *Barb.*, 178).

The question presented by this appeal is whether or not the admitted possession by the mortgagors was for a definite or uncertain and contingent time. There is some confusion possible to arise from the cases of *Farrell* agt. *Hildreth* and

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Hall agt. *Sampson* (*supra*). The mortgages in those cases contained the usual insecurity or danger clause. The learned justice writing the opinion in *Farrell* agt. *Hildreth* evidently thought the clause rendered the interest of the mortgagor uncertain, and therefore not liable to levy under an execution, but the decision was founded rather upon the fact of the sale having been made after demand by the mortgagee on the sheriff and direct personal notice to him of the mortgage.

The case of *Hall* agt. *Sampson* gives decidedly less effect to the insecurity provision. The opinion refers to a then recent decision by the same court, the case of *Werner* agt. *Miller*, in these words: "In deciding this we necessarily held that until the mortgagee exercised the power vested in him under the 'danger clause' in the mortgage, by obtaining or claiming the possession, for the reason that he deemed himself insecure, the mortgagor had an interest in the property, which was the subject of levy upon execution; that the right of the mortgagee to the possession of the property did not depend upon his mere pleasure, but on the fact of his deeming himself insecure, which fact could only be established by his acts."

The question was directly adjudicated in *Hathaway* agt. *Brayman* (42 *N. Y.*, 322), the court saying: "Under the rule laid down in *Hall* agt. *Sampson* the rights of the mortgagor and mortgagee are the same as they would have been if the mortgage had contained the express condition that the mortgagor was to continue in the possession until default in payment or until the mortgagee should deem himself unsafe, and should in consequence thereof take possession. And under such a mortgage as that the rule clearly is that prior to such default or taking possession the mortgagor has an interest in the mortgaged property which may be levied upon by execution against him, and will authorize the sheriff to take the property into his possession and sell it without reference to the mortgage."

In the case at bar there could be no default with conse-

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quent right of possession until demand of payment. This gives a far more definite character to the mortgagor's possession than if held with an insecurity clause in the mortgage. It was certain, because continuing until demand for payment and until default then made, they had no right to take the property (*Wagner* agt. *Jones*, 7 *Daly*, 375).

The judgment should be affirmed, with costs and disbursements.

VAN BRUNT, J., concurred.

VAN HOESEN, J. — There is no doubt that there are *dicta* in *Hall* agt. *Sampson* and *Hathaway* agt. *Braman*, as well as in several other cases decided by the court of appeals, that where a chattel mortgage gives to the mortgagor a right of possession till the payment of the mortgage debt be demanded, he has an interest in the mortgaged property that may be levied upon and sold. The case of *Livin* agt. *Orser* (5 *Duer*, 501) was a case in which the mortgagor, to whom the mortgage gave the right of possession until the payment of the debt was demanded, brought an action against the sheriff for levying upon the mortgaged property which was alleged to be exempt from execution. The court held that the property was exempt, but that the property, if not exempt, would have been subject to levy under an execution against the mortgagor, inasmuch as the mortgage gave to the mortgagor the right of possession until payment was demanded. I do not think that these *dicta* should induce this court to overrule the decision which this court made, upon great deliberation, in *Brown* agt. *Cook* (3 *E. D. Smith*, 123). That decision is clearly to the effect that, though the mortgagor has the right of possession until the mortgagee demands payment, the interest of the mortgagor is not subject to levy.

I concur, however, in the correctness of the judgment rendered at the trial term.

Minzesheimer agt. Mayer.

SUPREME COURT.

LAZARUS MINZESHEIMER and others agt. FERDINAND MAYER
and others.*Assignment — When its legality to be assumed — What necessary to be shown to justify granting injunction restraining assignee from executing his trusts.*

Unless an assignment for the benefit of creditors is void upon its face, or the extrinsic facts which go to show its invalidity are most clearly made out, its legality is to be assumed; and a clear case voiding the assignment should be made out to justify the granting of an injunction against the assignee restraining him from executing the trusts created by it.

*Special Term, February, 1884.**Otto Hornitz*, for plaintiffs.*Richard S. Newcombe*, for defendants Mayer and others.*Stern & Myers*, for James, assignee.

LAWRENCE, J. — My examination of the affidavits in this case has failed to convince me that the assignment which is attacked by the plaintiffs is void or that such a clear case has been made out by the plaintiffs as to justify the granting of an injunction against the assignee restraining him from executing the trusts created by the assignment. Most of the alleged declarations of the assignor set forth in the moving affidavits were made after the execution of the assignment and could not be admitted in evidence upon the trial of the action even if they were true (*Ogden agt. Peters*, 15 *Barb.*, 560; *Hanna agt. Curtis*, 1 *Barb. Ch.*, 263; *Peck agt. Crouse*, 46 *Barb.*, 151; *Cuyler agt. McCartney*, 40 *N. Y.*, 221).

The allegations in the moving affidavits which are designed to show that such declarations were made appear to be fully met and answered in the defendants' affidavits, and as the burden of proof is upon the plaintiff I do not think that in a

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case of this magnitude a court should interfere and tie up the large amount of property which has been transferred to the assignee for the benefit of creditors.

Indeed, the preponderance of evidence on this point is, I think, entirely in favor of the defendants. So, too, with respect to the allegations in regard to the alleged preferences of fictitious debts. Those allegations are met and controverted by the affidavits of the assignors and Burke.

The alleged fraudulent transfer of specific property to M. Feuchtwanger & Co. is, I think, shown by the defendants' affidavits to have been an honest and fair transaction. Annexed to the affidavit of Ferdinand Mayer, is a copy of the check of M. Feuchtwanger & Co. for \$15,000. This check was paid and the money realized from it was the loan to secure which the goods are alleged to have been fraudulently transferred to M. Feuchtwanger & Co.

Notwithstanding the criticism made in the plaintiffs' affidavits upon the depreciation in the value of his property, stated by the defendant to have taken place in so short a time, I am satisfied that the transaction cannot be challenged upon this motion, and that the goods were no more than an adequate security for the *bona fide* loan made by Feuchtwanger & Co. to the assignors. So far as I am able to determine, the only specific allegation of the concealment of property by the assignors is that which relates to the \$15,000 worth of goods which is above adverted to. If that transaction was a fair one, as on the preponderance of evidence now before me, it seems to have been, the plaintiffs fail upon this branch of their case. As to the general allegations of concealed property, it is only necessary to say that they form no ground for issuing a preliminary injunction. If an injunction were to be granted by the court upon such allegations alone, it would be possible in almost every case for the creditor who was dissatisfied with the provisions of the assignment to tie the hands of the assignee to the great detriment and injury of the general creditors of the assignors.

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The allegations in reference to the division of fees by the original assignee, and in respect to the threat that said assignee would not pay over the property which had come into his possession to the substituted assignee until he had fully accounted, in pursuance of the requirements of the order of the court of common pleas, are most explicitly denied by the original assignee, and also by Mr. James, the substituted assignee.

Neither do I find that the plaintiff has made out upon the evidence laid before me that there are any preferences in the assignment in excess of the actual indebtedness to the parties preferred in the assignment.

The affidavit of Burke is explicit upon the point that the indebtedness to him was not paid prior to the assignment, and also to the effect that the preferences to him in the assignment are not in excess of the actual indebtedness of the assignors to him. Mr. Rosenberg also shows in his affidavit that the assignors were in fact indebted to the firm of Rosenberg & Co. in the sum of \$2,500 in excess of the sum for which said firm was preferred. Mr. Pomeroy also shows that his firm are creditors of the assignors for at least \$14,000 over and above the amount for which the firm of Pomeroy & Plumber were preferred by the assignors, and that his firm's claim, for which judgments are entered, is for about \$192,000, in addition to which he alleges that he, as an individual, is a creditor of the assignors in the sum of \$60,000, and that neither he nor his firm are preferred for the full amount of their claims.

On the whole case I am of the opinion that I ought not continue the injunction heretofore granted herein. In arriving at this conclusion I am not unmindful of the points which have been presented with so much earnestness by the learned counsel for the plaintiffs in the elaborate brief presented upon the argument of the motion. It may be, and is perhaps true, that it is not equitable to permit an insolvent debtor to single out certain persons from the mass of his creditors and prefer their debts. But the law permits such preferences. Unless

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such an assignment is void upon its face or the extrinsic facts which go to show its invalidity are most clearly made out, its legality is to be assumed. As I have already stated the extrinsic facts upon which the plaintiffs rely to establish that the assignment is void as to creditors are so comprehensively met and denied by the affidavits and answers read on the part of the defendants, that the plaintiffs do not succeed in bringing themselves within this rule.

For these reasons I am of the opinion that the motion to continue the injunction should be denied, with costs.

SUPREME COURT.

In the Matter of WILLIAM McDONALD.

Contempt—Power of the state senate to commit a contumacious witness for contempt—Shown to be contrary to the constitution and the common law, and also to the decision of the supreme court of the United States.

The senate of the state of New York directed its standing committee on cities to investigate the Department of Public Works in the city of New York, and ascertain whether or not certain "grave charges of fraud and irregularities" made by the "public press" and by the "Union League Club of the city of New York," against Hubert O. Thompson, the head of such department, were true; such committee was empowered to "send for persons and papers," and was directed "to report the result of such investigation and its recommendations concerning the same to the senate, on or before the 15th day of April, 1884." The senate had no *judicial* control of the officer whose conduct was to be investigated, but could initiate *legislation* to prevent abuses in such department, and to remove its head. One William McDonald had been summoned as a witness before the senate committee, and had refused to answer questions concerning materials furnished to such department, and other questions touching his business as a dealer in coal, and had left the presence of such committee, and declined to be further examined. For such conduct McDonald had been adjudged by the senate to be in contempt, and had been sentenced to imprisonment in the common jail of Albany county, "until the final adjournment of the present legislature, unless sooner discharged by order of the senate."

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On an application for his discharge from such imprisonment by *habeas corpus*, returnable at the Albany oyer and terminer, then in session, it was

Held, first. The resolution of the senate should be construed as authorizing an inquiry for the purpose of *legislation*, and not simply as one to determine the truth of charges made against an official, over whom it had no *judicial* control.

Second. The power to punish for a contempt is a *judicial* and not a *legislative* one (*This proposition discussed on principle, and Kilbourn agt. Thompson*, 103 *U. S.*, 168, 193; *Kielley agt. Carson*, 4 *Moore's P. C.*, 62, 89, 90; *Fenton agt. Hampton*, 11 *Moore's P. C.*, 347, 252, *etc.*; and *Doyle agt. Falconer*, 1 *Law Reports, P. C.*, 328, cited as establishing it).

Third. The provisions of the Revised Statutes (1 *R. S.*, [*Ed.'s ed.*], 153, *sec.* 13, *sub.* 4), so far as they authorize the punishment by the legislature, or either house thereof, of an alleged contempt incurred in the prosecution of a purely *legislative* inquiry, and not in one in which it has *judicial* functions to discharge (there are *judicial* duties devolved upon the legislature and each house thereof by the constitution of the state), *believed* to be unconstitutional for two reasons, to wit: 1st. The lodgment of *judicial* power in a different department is a prohibition against the transfer by the legislature to itself of any such power. 2d. As violating article 1, section 6 of the constitution of the state, declaring "No person shall be * * * deprived of life, *liberty* or property without due process of law" (*Citing Kilbourn agt. Thompson*, 103 *U. S.*, 168, 182; *Taylor agt. Porter*, 4 *Hill*, 140-147; *People agt. Draper*, 15 *N. Y.*, 532, 543, 544; and *Happy agt. Mosher*, 48 *N. Y.*, 313).

Fourth. The power to punish for an alleged contempt incurred in the course of an inquiry, made for the purpose of *legislation*, is not an *inherent* one in a legislative body. The *dicta* to the contrary in elementary text books and *judicial* opinions, all rest upon *Anderson agt. Dunn* (6 *Wheaton*, 204), *Burdett agt. Abbott* (14 *East.*, 1131), and some of the earlier English cases, all of which are overruled, the first in *Kilbourn agt. Thompson* (103 *U. S.*, 168), and the last in *Kielley agt. Carson* (4 *Moore's P. C.*, 62), *Fenton agt. Hampton* (11 *Moore's P. C.*, 347), and *Doyle agt. Falconer* (1 *Law. Rep.*, *P. C.*, 328).

Fifth. The congress of the United States is a legislative body as well as a legislature of the state. Whatever unconferrred powers the latter has as ancillary to its right to legislate, must also be possessed by the former in aid of its legislation upon subjects within its jurisdiction. The case of *Kilbourn agt. Thompson* is, therefore, applicable to the present (The alleged inherent power of a legislature to punish for a contempt committed in the progress of an inquiry, purely *legislative*, considered on reason and authority. *Kilbourn agt. Thompson* analyzed, and its effect upon the present case shown).

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Sixth. Neither branch of the state legislature, under section 17 of article 1 of our state constitution, obtains the power to punish for contempt in aid of *legislation*, because: 1st. It was not a part of the "common law" of England, but of the "*Lex et Consuetudo Parliamenti*," and as parliament asserted and was universally conceded, its "power being above the law is not founded upon the common law." 2d. No act of the legislature of the colony of New York ever conferred upon itself any such power. 3d. As the power of parliament was *omnipotent*, and the power to punish for contempt was never conferred upon the colonial nor the state legislature, it is a legal impossibility that either could succeed thereto as an *inheritance*, for both took only *conferred* power. (*These propositions, discussed at considerable length, citing the cases before referred to, and also Bancroft's History of the U. S., vol. 2, p. 414; vol. 3, pp. 56, 101; 2 R. L. of 1813, appendix, page 6; 1 Blackstone's Com. 160, 161, 163; Landers agt. Woodworth, 2 Can. Sup. Ct. Reps. 158, 1 Hallam's Con. His. 224, 225.*)

Seventh. If the provisions of the Revised Statutes before cited, and which are claimed to confer the power exercised, are unconstitutional, then they were not validated by article 1, section 17 of the constitution because only such statutes as were "*in force*" at the time of the adoption of the constitution are covered by its language. In no proper sense can an unconstitutional law be said to be "*in force*." Neither can a long continued *claim* of power and its *occasional* exercise confer it if illegal. A citizen deprived of liberty can always question the existence of an authority which holds him in custody.

Eighth. The power of the state legislature, and of either house, to punish for a contempt committed during the progress of judicial inquiry which it is authorized to make (in determining the election, etc., of its own members, in investigations with reference to impeachments by the assembly, and various other cases specified in the constitution) are undeniable, but the existence of any such power in aid of *pure legislation* is more than doubtful. While a single judge, holding without associates a court, entertains these views, both on reason and on a careful study of the recent utterances of the supreme court of the United States and of the privy council of England, he should still in judicial *action*, while freely discussing, as it is his duty to do, a question of such vast importance, to the end that it may be rightly settled, not rashly attempt to overturn and disregard the practice of the state for many years, the judicial *dicta* of its judges, and the opinions of elementary writers of acknowledged high authority, upon cases not necessarily controlling in this state. Especially should he not do so when its effect will be, if he is wrong in his views, to improperly arrest an important inquiry which a legislative body, largely composed of eminent lawyers, supposes it has the power to pursue; and to practically overrule a

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decision of the general term of this department (*People* agt. *Learned*, 5 *Hun*, 626), the court immediately above the one which he is holding. As McDonald will be entitled to full redress if his imprisonment be adjudged unlawful, he must be remanded to the custody of the sheriff of Albany county to be held by such sheriff under the senate's commitment, or until a higher court shall, with the additional light before it afforded by the recent decision of the supreme court of the United States reconsider its own conclusion, reached without any discussion by it, probably on the faith of *Anderson* agt. *Dunn*, and the older English cases.

Ninth. Section 719 of the Penal Code does not apply. That section was intended to define with accuracy when the penalties for crime prescribed by such code took effect, and such penalties relate only to those which are to be pronounced by courts on criminal prosecution instituted to punish crime. It does not interfere with any power elsewhere bestowed to punish summarily for contempt.

Albany Oyer and Terminer, March, 1884.

APPLICATION by McDonald to be discharged from imprisonment in the common jail of Albany county, in which he is confined by the sheriff of such county, under a commitment of the Senate of the State of New York, which recites a judgment of such body holding him to be in contempt for refusing as a witness to answer questions propounded by its standing committee upon cities, and sentencing him to imprisonment therefor.

T. C. E. Ecclesine and *Hamilton Harris*, for McDonald.

Henry Smith and *N. C. Moak*, for the sheriff.

F. W. Whittridge and *B. F. Tracy*, for the Senate.

WESTBROOK, *J.*—William McDonald, who is confined in the jail of Albany county, through and by the writ of *habeas corpus* asks his discharge from such imprisonment.

The writ was allowed by the Hon. WILLIAM L. LEARNED, one of the justices of the supreme court of this state, and was made returnable at the court of oyer and terminer, then in session in the county of Albany, as the law required

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(2 *Ed. Stat.*, 784, *sec.* 227; *People ex rel. Phelps* agt. *Fancher*, 2 *Hun*, 226, 236, 237).

The petition and return show the cause and circumstances of the commitment of McDonald to be as follows:

On the 14th day of January, 1884, the senate of the state of New York passed the following preamble and resolution:

“*Whereas*, Grave charges of fraud and irregularities have been made from time to time by the public press, and recently by the Union League Club of the city of New York, against Hubert O. Thompson, commissioner of public works in the city of New York; and

“*Whereas*, These charges have, in the opinion of many persons, never been satisfactorily explained and fairly refuted; and

“*Whereas*, It is of vital importance to all the taxpayers of this state that the heads of all public departments should be beyond reproach; therefore be it

“*Resolved*, That the standing committee on the affairs of cities of this senate be, and it hereby is, directed and empowered to investigate the Department of Public Works in the city of New York, with power to send for persons and papers, and said committee is hereby authorized to employ a stenographer and such counsel and accountants as it may deem necessary for the thorough discharge of the duties hereby imposed. Such committee to report the result of such investigation and its recommendations concerning the same to the senate on or before the fifteenth day of April next.”

During the month of February succeeding the date of the passage of the resolution just given, William McDonald, in obedience to its subpœna, appeared before the senate committee as a witness, and was examined at considerable length in regard to material — gravel, limestone chips, &c. — which he had furnished to the city. The witness, through his counsel, who appeared, as the committee held, only by its courtesy and not by right, refused and declined to answer sundry questions designed to ascertain where he had obtained the materials

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furnished to the city by him, and also other questions concerning his business as a dealer in coal. The witness finally, by advice of counsel, retired from the presence of the committee and refused to be further examined.

The senate committee reported the conduct of the witness to the senate, and on the 27th day of February, 1884, in pursuance of its resolution and by force of its warrant issued to its sergeant-at-arms, McDonald was brought before the senate to answer for his alleged contempt in refusing to answer the questions propounded by the committee, and in leaving the presence of the committee after a refusal to submit to a further examination. Upon his arraignment before the senate McDonald was heard by counsel, and the result was the adoption of a resolution by the senate on the 28th day of February, 1884, *adjudging* him to be in contempt for refusing to answer the questions asked by its committee, and for refusing to submit to a further examination by and before such committee, and *sentencing* him to imprisonment in the Albany county jail until he should submit himself to be examined by such committee, and in case of his refusal so to do, the imprisonment to continue until the final adjournment of the legislature. Under such resolution McDonald was remanded to the custody of the sergeant-at-arms, who was directed to deliver him to the sheriff of Albany county, to be confined by said sheriff in the common jail of such county "until the final adjournment of the present legislature, unless sooner discharged by order of the senate."

After the adoption of the resolution by the senate McDonald was again brought to its bar, and was informed by the president of its sentence. The senate then issued its warrant under its seal, signed by its president and clerk, reciting the proceedings had before it, and directing the imprisonment of McDonald in conformity with its sentence, under which warrant he is now imprisoned in the Albany jail, and which warrant is returned to the court as the sole cause and ground of imprisonment.

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Preliminarily to the statement of the question which this proceeding presents, it is proper to observe that, in support of the legality of the imprisonment of McDonald, it is not urged that either the senate or the legislature had any *judicial* control over the incumbent of the office of commissioner of public works of the city of New York. Neither could punish him for crime nor remove him for cause. It could, however, initiate *legislation* concerning the office, and thus, with the concurrent action of the assembly and the approval of the governor, remedy any deficiencies in the statutes regulating the office, and by force of legal enactment provide for the removal of the commissioner and for the selection of another individual to fill his place. It was strongly urged upon the argument in behalf of McDonald that the resolution of the senate does not contemplate any legislative action whatever, but only and solely an investigation as to the guilt of the commissioner of the charges which are recited in the resolution. The adoption of this view, however, as it imputes to the senate an assumption of power, is forbidden by the respect for that high and dignified body which should be cherished and observed by every judge. It will be assumed therefore that the inquiry which the resolution authorized was to be conducted for a legitimate and proper purpose, and that when the senate directed its committee "to report the result of such investigation, and its *recommendations* concerning the same," it intended thereby that such committee should report what legislation was, in its judgment, required to remedy evils or abuses, if any such were found.

From this narrative of fact it is evident that the question submitted is not, can the legislature, or either branch thereof, in execution and discharge of *judicial* functions (and there are some of that character expressly conferred by the constitution of the state, such as, "Each house shall * * * be the judge of the elections, returns and qualifications of its own members," of the assembly to impeach, of the senate to

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remove from office, upon the recommendation of the governor, etc.), punish for contempt? Nor is it, can either house in aid of legislation examine witnesses on oath, a right though most seriously questioned in a recent case by the supreme court of the United States (*Kilbourn* agt. *Thompson*, 103 *U. S.*, 168-189)? But it is this, can either one of the two houses comprising the legislature of the state, through the authority which it undertakes to confer upon a committee, and by the agency of such committee, obtain and compel the testimony of individuals, supposed to be needed for the purpose of legislation, and on the refusal of any individual to attend as a witness and to give evidence, *punish* him for the alleged *offense or crime* of so refusing?

The question is certainly a grave one, and one which has never before in this state been so directly and flatly presented to a court for adjudication as now. It involves a careful study of the effect of the lodgment of the executive, legislative and judicial powers of the state in distinct and different departments, and the restraints thereby imposed upon legislative power, the inherent or inherited prerogatives of the legislature, or of either house thereof, and the necessary limitations upon all power under a republican system of government. The discussion and consideration should be conducted with a sincere respect for that body in which, together with the assembly, by the constitution of the state, it is declared, "The legislative power of this state shall be vested," and with an honest desire to preserve to it all its rights and privileges, but yet with a determination also to preserve to each great department of the government of the state the power lodged by the constitution therein, the preservation of which to each is vital to the liberties and rights of the people of this commonwealth.

With the spirit just indicated the examination of the question is approached, and in the forefront of inquiry is another query to be answered, upon the true solution of which the correct answer to the other must largely depend,

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and it is this: Was the power which the senate exercised over McDonald *judicial* or *legislative* in its character?

In answering this question it is necessary to bear in mind not only the fact of the imprisonment of McDonald, but also the *language* of the order or resolution which commanded such imprisonment, to the end that the true nature and character of the power assumed may appear. The resolution recites that he had "been *declared* to be *guilty* of a contempt of the senate," and was "*convicted* thereof." It then states the particular contempt of which he was "*declared* * * * *guilty*," and of which he had been "*convicted*," and then proceeds to announce the *punishment* to imprisonment, as hereinbefore stated, and which is preceded by the words "is hereby *sentenced*." The language of the president of the senate in communicating to McDonald the determination of that body is also equally significant as to the character of the power it claimed to exercise. He said, after stating the offense of which McDonald had been adjudged guilty: "It becomes my duty to communicate to you, at this time, the *judgment* or *punishment* the senate has seen fit to impose upon you for the *offense* which you have committed." This declaration is followed by an enunciation of "the judgment or sentence" imposed by the senate.

From the foregoing statements of facts it is apparent that the senate summoned McDonald to answer for an *offense*; that after a hearing or trial upon which he was represented by counsel, it declared him "to be guilty" and "convicted" him "thereof," and then "sentenced" him to "the judgment or punishment" of imprisonment in the county jail of Albany county, where he is now detained, and where he must continue, unless relieved by this proceeding, "until the final adjournment of the present legislature, unless sooner discharged by order of the senate." It needs no elaborate argument to prove that this was the exercise of *judicial* and not of *legislative* power. This conclusion follows irresistibly from the

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conceded truth that while it is the prerogative of the legislature, as a general rule, only to enact laws, and thus to declare what acts shall be deemed criminal, subject, however, to the restraints of the fundamental law, it is also, as a general rule, the prerogative of courts alone to interpret the laws, and to apply and enforce their remedies, either as between individuals or as between the state and parties subject thereto. There is, however, no occasion for abstract reasoning upon this point, as in the recent case of *Kilbourn* agt. *Thompson* (103 U. S., 168-193), precisely the power which the senate has exercised, of general inquiry by a committee and the punishment as for a contempt of a person refusing to testify, was held to be "judicial and not legislative" (*See, also, Kielley* agt. *Carson*, 4 *Moore's P. C.*, 62, 89, 80; *Fenton* agt. *Hampton*, 11 *Moore, P. C.*, 347-352, &c.; *Doyle* agt. *Falconer*, 1 *L. R., P. C.*, 328, in which, on page 350 it is distinctly asserted, that "a power to punish for contempt is a judicial power").

As then, the power which has been exercised over McDonald was judicial, which, as a rule, must be exercised by courts alone, in which that general power is lodged by the constitution of the state, and as the senate had no judicial authority over the official whose conduct they were investigating when the alleged contempt was committed, and as the constitution of the state expressly vests only *legislative* power in the senate and assembly, it is a most important question to be determined, as personal liberty is involved, when and how, and by virtue of what, did the senate acquire the *judicial* power, which alone can sentence the citizen to imprisonment in a common jail. It is true that there are statutory enactments in this state (1 *Ed. R. S.*, 153, *sec. 13, sub. 4*), which undertake to confer upon "each house * * * the power to punish as a contempt, and by imprisonment, a breach of its privileges, or of the privileges of its members" in certain specified cases, among which are, "that of refusing to attend, or be examined as a witness, either before the house or a committee, or before any person authorized by the house, or by a committee, to take

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testimony in legislative proceedings." It is also true that this enactment can have force by limiting its provisions to those cases, in which by the constitution of the state either house has judicial powers (some of which have been previously mentioned), but it cannot be denied that relying upon the case of *Anderson* agt. *Dunn* (6 *Wheaton*, 204), and which they refer to in their notes (3 *R. S.* [2d ed.], 456), the revisers of our statutes supposed that the power to punish for contempts existed in both branches of the legislature. The authority relied upon, however, which does hold that either house of Congress has, by virtue of its *legislative* power, *general* authority to punish for contempt, is distinctly overruled in the more recent case by the same tribunal (the supreme court of the United States) in *Kilbourn* agt. *Thompson* (103 *U. S.*, 168). Of *Anderson* agt. *Dunn*, judge MILLER, in giving the opinion of the court in the later case, says: "It was decided as a case of the first impression in this court, and undoubtedly under pressure of the strong rulings of the English courts in favor of the privileges of the two houses of parliament. Such is not the doctrine, however, of the English courts to-day." The learned judge then refers to the English cases (103 *U. S.*, 198, 199, 200), and concludes with the distinct repudiation of the extreme view of the power of either house of congress, affirmed in *Anderson* agt. *Dunn*. Notwithstanding then the existence of a positive legislative enactment justifying the power exercised in the case of McDonald, and notwithstanding the very eminent source from which it emanated, the revisers of our statutes who were misled by the opinion of our highest federal tribunal, since overruled by the same supreme authority, it is still proper to ask, how could the legislature confer upon itself, or upon either branch thereof, judicial power for the purposes of general legislation? Or to put the question more fully and accurately, it being conceded that the alleged contempt for which McDonald is imprisoned was committed, if at all, not in the course of a *judicial* inquiry, which the senate, by the constitution was authorized

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to make, but in the course of a *legislative* inquiry instituted with a view to possible *legislation*, how could a mere statute confer upon it the power which it has exercised? We are thus brought (as it is cited to uphold McDonald's imprisonment) to the discussion of the constitutionality of a statute of the state, an inquiry, certainly of the gravest character, but one which courts must consider and decide, when arising in the due course of a judicial proceeding.

It cannot be denied that the law-making power of the state is more general, and reaches a class of subjects, upon which the congress of the United States cannot legislate; and as the grant of power to the legislature to legislate is general, it is for those who question the constitutionality of a statute to show that it is forbidden (*People* agt. *Draper*, 15 *N. Y.*, 532, 543). But while all this is true, it is also true that there are "positive restraints upon the legislative power contained in the" constitution, and that, as was further well said by DENIO, C. J., in the case just cited (*p.* 544) in regard to that instrument: "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance." To this must be added the further thought that the jurisdiction of congress to legislate, when exercised over the subject-matters confided to its care, is as supreme as that of the legislature of the state over those of which it has cognizance, and that, therefore, whatever authority or right, which exists *as an incident of or as ancillary* to the simple power of legislation, must be possessed in an equal degree by both, for to each, subject, of course, to certain fundamental restraints, has been confided all the authority which the people (of the several states in the one instance, and of one state in the other) had to legislate upon the subjects committed to each. The

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constitution of this state, too, fails to confer upon its legislature, as the constitution of the United States does upon its congress, the express power to punish the citizen, and both declare "no person shall be * * * deprived of life, liberty or property without due process of law." These considerations make the case of *Kilbourn agt. Thompson* (103 U. S., 168) applicable to the present, and the conclusion therein drawn from the distribution of the executive, legislative and judicial functions into different departments controlling on the point now being considered.

Conceding then that the power which has been exercised by the senate is a judicial one, that it was exercised in the pursuit of an inquiry which was legislative and not judicial in its character, that by the constitution of the state its judicial power is committed to courts which are therein recognized, and to such other courts as the legislature are thereby authorized to establish, and that such deposit of general judicial power elsewhere than in the legislature is a prohibition against the conferring of such power upon itself, it is impossible to see how the provisions of the Revised Statutes, before quoted and upon which action has been based, can constitutionally confer upon the senate of this state the power which has been assumed. It is not designed by this to assert that the statutes in question are wholly void. They may have full application by limiting them to cases in which either house may act *judicially*, but upon reason and authority they must be held impotent to confer a general power to commit and punish as a contempt the refusal of an individual to give evidence, when such testimony is required solely for the purpose of *legislation*.

Not only, however, is the statute under consideration to be held inoperative in its application to the present case, for the reason that the power exercised thereunder is a judicial one, and cannot be lodged by the legislature elsewhere than where the constitution has placed it, but also because it violates the express provision of that instrument declaring (*art. 1, sec. 6*):

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"No person shall be * * * deprived of life, *liberty* or property without due process of law."

In *Taylor* agt. *Porter* (4 *Hill*, 146, 147), judge BRONSON, in speaking of this clause, said: "The words 'due process of law' in this place cannot mean less than a *prosecution or suit* instituted and conducted according to the prescribed forms and solemnities *for ascertaining guilt* or determining the title to property."

In *Kilbourn* agt. *Thompson* (103 *U. S.*, 198, 182), the supreme court of the United States, per MILLER, J., said: "Of course, neither branch of congress, when acting separately, can lawfully exercise more power than is conferred by the constitution on the whole body, except in the few instances where authority is conferred on either house separately, as in the case of impeachments. No general power of inflicting punishment by the congress of the United States is found in that instrument. *It contains in the provision that no person shall be deprived of life, liberty or property without due process of law the strongest implication against punishment by order of the legislative body.* It has been repeatedly decided by this court and by others of the highest authority, that this means *a trial* in which the rights of the party shall be decided by a *tribunal* appointed by law, which *tribunal* is to be governed by rules of law previously established."

In holding that this provision of our state constitution is applicable to the case under consideration, the force of certain decisions of our court of appeals (*Happy* agt. *Mosher*, 48 *N. Y.*, 313; *People* agt. *Supervisors*, 70 *N. Y.*, 228), holding that due process of law "need not be a legal proceeding according to the course of the common law," has not been overlooked. While the cases referred to were undoubtedly correctly decided, it can hardly be supposed that the most ardent advocate of plenary power in the legislature would attempt to sustain the constitutionality of a statute which directed a committee of either house to inquire into a controversy between individuals, and upon the report of such com-

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mittee authorize either house, or the legislature itself, to decide such controversy. Nor would a law authorizing an inquiry by means of a legislative committee as to the commission of crime, and its punishment by the legislature, or either house thereof, upon the report of its committee, be deemed valid. Such attempted legislation in either case would be void, not only for the reason that it undertook to transfer judicial power from the courts, where the constitution places it, but also because it violates the provision of the constitution forbidding the deprivation of life, liberty or property without due process of law. In *Happy agt. Mosher*, before cited, Judge EARL, while holding that the proceeding which takes property need not be one according to the course of the common law, distinctly says: "An approved definition of due process of law is, '*law in its regular course of administration, through courts of justice*' (2 *Kent's Com.*, 13)."

As McDonald is confessedly deprived of his liberty, not according to "law in its regular course of administration through courts of justice," the legality of such imprisonment must be upheld by some other argument than one founded upon the statute which, as is alleged, confers it. If the power exercised is a judicial one (and that it is is too clear to be debatable), then the attempt to confer it by law upon the legislature, or either house thereof, in a case over which it has no judicial power, must fail for the reasons given, unless also it is one inherent in a legislative body, as in courts, as the revisers seemed to suppose, when they reported these statutory provisions. Is it so inherent is the next question to be considered.

In the discussion of this question it must be conceded that there are not wanting cases, nor opinions of elementary writers, holding that the power to punish for contempt is one inherent in every legislative body. (*Cooley on Const. Lim.*, 134; 1 *Kent*, 236; 1 *Story on the Const.* [4th ed.], sec. 847). Such decisions and opinions, however, are founded upon the usage of the English parliament, the case of *Burdett* agt.

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Abbott (14 *East.*, 1-131), with the earlier decisions of the English courts, and the case of *Anderson agt. Dunn* (6 *Wheaton*, 204). In the quite recent case, however, of *Kilbourn agt. Thompson* (103 *U. S.*, 168), which follows the later English cases, overruling in that particular *Burdett agt. Abbott* and the older decisions, the supreme court of the United States, in an exhaustive opinion by MILLER, J., has repudiated the conclusions announced in *Anderson agt. Dunn*, and held that "an examination of the history of the English parliament and the decisions of English courts, shows that the power of the house of commons, under the laws and customs of parliament to punish for contempt, rests upon principles peculiar to it, and not upon any general rule applicable to all legislative bodies. The parliament of England, before its separation into two bodies, since known as the house of lords and the house of commons, was a high court of judicature, the highest in the realm, possessed of the general power incident to such a court of punishing for contempt. On its separation the power remained with each body, because each was considered a court of judicature and exercised the functions of such a court."

It was argued, however, that the question in *Kilbourn agt. Thompson* related to the power of a single house of congress, and that the question of the power of a state legislature was not before the court. This is true, but the point what legislative power is inherent in a legislative body *as such*, was before the court, and the existence of the power, as a legislative one to punish for contempt, was denied. Neither, as has been before partially argued, is there such a difference between the legislature of a state and congress as to make that decision inapplicable to the present case. Certainly congress is a legislative body as well as a state legislature. If the right to punish for contempt exists by force of the fact that power to legislate is conferred, then it must exist in both. That the field of legislation varies cannot change the prerogative which follows the simple power to legislate, and therefore the conclusion which the court, in *Kilbourn agt.*

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Thompson, drew from the fact that the judicial powers of the two houses of the English parliament were not "applicable to all legislative bodies," is conclusive against the existence of the power in a state legislature simply, and only because it has law-making power.

The case of *Kilbourn* agt. *Thompson*, which has been so often referred to in the course of this opinion, is well worthy of a careful study, not only because it is the judgment of the highest court in the land, but also because the learned and exhaustive opinion of Mr. Justice MILLER conclusively shows that past precedents of the congress of the United States and of the legislatures of the several states in legislative inquiries are not to be followed. They all undoubtedly had their origin in the practice of the English parliament, which the case of *Anderson* agt. *Dunn* (6 *Wheaton* 204) held to be applicable to both houses of congress. The resolution under which the inquiry of the committee of the house of representatives in the *Kilbourn* case was conducted, recited that the United States was a creditor of the bankrupt firm of Jay Cooke & Co., and became such "from the improvident deposits made by the secretary of the navy of the United States, with the London branch of said house of Jay Cooke & Co., of the public moneys;" that the house of Jay Cooke & Co. were largely interested in a real estate pool in the city of Washington, of their interest in which a settlement, disastrous to their estate and to its creditors, had been made by their trustee; and that, therefore, the affairs of such pool and the matters of such settlement should be inquired into by a special committee of the house, to be appointed by its speaker, "with power to send for persons and papers and *report* to this house." Of such a resolution, as it involved an inquiry into a transaction in which the general government, as well as private individuals, was interested, it might well have been said that under it legislation was contemplated to prevent in the future "improvident deposits" by an official of the United States with an individual banking house, and to pre-

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vent fraudulent settlements thereafter by trustees of the estates of adjudged bankrupts, and that, therefore, the inquiry was within the power of the house; and yet, after Kilbourn had declined to answer questions propounded by the committee touching the pool it was required to investigate, and had refused to produce its records, and for such refusal the house had adjudged him to be in contempt, and had imprisoned him therefor, in an action brought for the imprisonment the court held that the inquiry was beyond the jurisdiction of the house and the imprisonment illegal and contrary to law. Can that case be distinguished from the present? It is, undoubtedly, very similar. The argument founded upon the necessity of an investigation to formulate legislation is as forcible in the one case as in the other, and if in the one case such argument was not sufficiently potent to justify the imprisonment, it is not seen why it should be in the other. True it is that the decision referred to was directly predicated upon the power of congress, and not upon that of a state legislature, but of the subject-matter of the inquiry the house of representatives had as full and complete jurisdiction in the matter of Kilbourn as the senate of this state had in that of McDonald. In both cases the intent to legislate was evinced, if there was any such intent in either, by the direction to the committee "to report;" in both the private affairs of the citizen were sought to be discovered; and until now the right of investigation by congress and the state legislature has been placed, both by elementary writers and in judicial opinions, upon a common ground, as an incident to the law-making power. The most exalted tribunal of the land having deliberately held that such power as has been assumed by the senate in the present case (which is believed to be the logical sequence from the decision in the *Kilbourn case*), it is difficult to see how the imprisonment of McDonald can be sustained either on authority or reason.

If the decision in *Kilbourn agt. Thompson* has not foreclosed discussion of the question under consideration, it may

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be well to further consider the argument generally pressed to sustain the power of a legislative body to punish as a contempt the refusal of a witness to answer questions in aid of legislation, founded upon its alleged necessity. The argument, in brief, is this: The power is a necessary one to enable a legislative body to enact laws, and because necessary, though unconferred, it exists. The force of the old maxim, "*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest,*" is conceded as a general rule, but it would be difficult to prove that such a power is *indispensable* in the enactment of laws, and that legislators can only intelligently legislate in regard to crime and official delinquencies when they have *precise* information as to the crimes committed by particular individuals, and the delinquencies of particular officials. The truth is no such *exact* accuracy of knowledge has ever been acquired, either through investigation by examination of witnesses or without it, and the existence of our state government to-day, and our body of wise and wholesome statutes disprove the theory upon which the argument rests. It is not supposed in the present case that there was any intention impertinently to pry into the private affairs of a citizen, nor is there discoverable in the examination of McDonald any attempt to extort evidence which was not legitimate to the inquiry, provided the inquiry itself was legitimate and authorized by law. If the commissioner of public works of the city of New York had committed frauds, or if it was supposed he had, the machinery of the law, controlled by courts, was adequate to investigation and punishment. If the proper safeguards of integrity of official conduct in such commissioner were not embodied in the law creating the office, an examination of those statutes would disclose the opportunities for official peculation, and reflection would suggest proper amendment. The truth is, that if the "*Inquisitorial Power*" (this is the name given to it by the counsel for the senate) exists in a branch of the state legislature, the citizen can have no secret, all the details

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of his private business, the condition of his property and estate, any immoral conduct, any short-coming in thought, word or deed can be laid bare under the torture of imprisonment. Of course, good sense and honor will generally prevent such an abuse of power, but the statement of the ultimate conclusion is necessary before the concession is made of the existence of an unconferrred power in a republican state capable of such results. If such a power is inherent in the legislative department because its existence is necessary, why does it not, also, inherently reside in the executive? The governor may, when called upon to act officially, and especially when making suggestions as to legislation, often-times need exact information. Why should he not enjoy the same prerogative under the plea of necessity? The answer to the argument in both cases is, that, under republican governments the liberty of the citizen is secure, and the power which interferes with it must be conferred by the fundamental law. Extraordinary parliamentary prerogatives and privileges, by which the secrets of the citizen may be extorted and his liberties taken away, existing in a country where a parliament is supreme and gives to the people whatever rights they possess, cannot exist in a country, the government of which rests upon a precisely opposite theory, that the people confer all power, and that executives, legislatures and courts take only such authority as the people bestow. It was well said by BRONSON, J., in *Taylor agt. Porter* (4 Hill, 140-144): "Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void." To the argument, then, founded on necessity the answer is clear. Its possession may be convenient, but is not indispensable; its capacity for abuse is

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enormous; it deals with the liberty of the citizen upon the theory of existing parliamentary privileges, which have never been conferred, and because unconferred, cannot be exercised under a government republican in form, which, to be such in fact, as well as in name, cannot commit persons within its jurisdiction to an "Inquisitorial Power," uncontrolled by law, the only restraint being the discretion of the body exercising it.

The argument already made, to show that the power exercised by the senate in the case of McDonald is not one inherent in a legislative body, hardly needs the support of adjudged cases in addition to that of *Kilbourn* agt. *Thompson*, but the following, with the single exception of one in Canada, by the privy council of England, abundantly sustain it: *Kielley* agt. *Carson* (4 *Moore's P. C.*, 63); *Fenton* agt. *Hampton* (11 *Moore's P. C.*, 349-366); *Doyle* agt. *Falconer* (1 *L. R.*, *P. C.*, 328), and *Landers* agt. *Woodworth* (2 *Canada Sup. Ct. R.*, 158). If it is possible to settle a legal problem by weight of judicial character and learning, then this must be deemed settled, for looking at the learning of the judges who have rendered these decisions, especially that of *Kielley* agt. *Carson*, it is true, as Judge MILLER asserts in the *Kilbourn* case, that because of their weight such decisions "should be received as conclusive."

It was further argued that, under section 17 of article 1 of our state constitution, this power in question is conferred, because it adopts the common law of England and makes it a part of ours. A reference to that clause of the constitution will show that the whole body of the common law of England was not thereby introduced into this state, but only "*such parts* of the common law, and of the acts of the legislature of the colony of New York, *as together did form the law of the colony* on the nineteenth day of April, one thousand seven hundred and seventy-five * * * shall be and continue the law of this state." The truth is, that the powers of the English parliament were not dependent upon the common

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law at all (see cases above cited), but upon the *lex et consuetudo parliamenti*; and as early as 1604 the parliament called itself (1 *Hallam's Con. His.*, 254-5) "the high court of parliament," and then added, "whose power being above the law *is not founded on the common law*, but have their rights and privileges peculiar to themselves." It will be observed that the constitution adopts only "such parts of the *common law*, and of the *acts* of the legislature of the colony of New York, as together did form the law of the colony" on April 19, 1775, and no part of the *parliamentary* law. It is necessary, therefore, to sustain the position taken by the counsel for the senate, to prove that the power claimed was either part of the *common law* of the colony, or was contained in an *act* of its legislature. As it was not a part of the common law of England, it is difficult to see how it could become a part of the common law of the colony; and as no act of the colony ever conferred it, it is equally difficult to see how the constitutional provision referred to aids the position assumed. The ninth article of the first constitution of the state, adopted in 1777 (7th ed. *R. S.*, 39), did provide "that the *assembly* * * * shall choose their own speaker, be judges of their own members, *and enjoy the same privileges*, and proceed in doing business in like manner as the assemblies of the colony of New York formerly did;" but this clause gave no power to the *senate* and was omitted in the subsequent constitutions, and the provision now reads as has been set forth above. It has already been shown that the constitution, as it now reads, does not give any color to the argument that it validates the power in either branch of the legislature, but it may be well to show that the colonial legislature had no such power in fact.

It clearly was never granted. No such bestowal of authority can be found in the charter issued by Charles I to his brother James, duke of York, in 1664, nor in any act of parliament. It is unnecessary to detail the mode and manner of the government of the colony of New York while under English

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rule. It is sufficient to state that instead of the absolute power of parliament being conferred upon the colonial legislature, or upon the people themselves, its laws were subject to royal approval, and even the charter of liberties, passed on the 17th day of October, 1683, by the assembly of the colony, was vetoed by James (the same duke of York) when he became king in 1686, and the act of 1691 shared the same fate under King William (*Bancroft's History of the United States*, vol. 2, p. 414; vol. 3, p. 56; *Id.*, p. 101; 2 *R. L. of 1813*, note on page 6 of appendix). "Its" [parliament's] "absolute power," Mr. Bancroft says (vol. 3, p. 101), "was in general terms unquestioned in England, even by American agents, and was by itself interpreted to extend over all the colonies with no limitation but its own pleasure. It was 'absolute and unaccountable.'" The same author (page 108) further states: "The property, the personal freedom, the industry, the chartered liberties, of the colonies were placed in the good will and under the absolute power of the English legislature." It is unnecessary to pursue investigation as to the grant of power. It certainly was never made, and the learned counsel who have argued in favor of the continuance of McDonald's imprisonment, have failed to point out when, and by what it was bestowed.

Though the records of the past do not disclose the conferring of the authority claimed to have existed in the colonial legislatures, it is, nevertheless, insisted that it was *inherited*. The practice and dealing of the English crown and parliament with the colony, already referred to, are as conclusive against the existence of the power by *inheritance*, as by grant. If, however, it be clearly understood what power parliament had, the impossibility of the succession to such authority, either by the legislature of a colony or that of a republican state, will clearly appear. Blackstone, in his commentaries (vol. 1, pp. 160, 161) says: "The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within

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any bounds. And of this high court, he adds, it may be truly said '*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*' It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown, as was done in the reign of Henry VIII and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reign of King Henry VIII and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves, as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible, and, therefore, some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament." The same author (*page 163*) further observes: "For as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti*; a law which, Sir Edward Coke observes, is '*ab omnibus quærenda, a multis ignorata, a paucis cognita.*'" Is it to be gravely argued that such supreme power, such extraordinary prerogatives, passed by *inheritance* to either a colonial or state legislature, both of which took only *conferred*, and not *inherited* authority? If they did, then freedom found no asylum on American soil, and the founders of states unconsciously brought with them a tyranny,

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which, like their shadows, followed them across the Atlantic and descended, like the mantle of the prophet, upon the shoulders of the body they created, in the vain hope that well-defined and circumscribed power, and not omnipotence, had been by them bestowed. If it be urged that, by inheritance, legislatures took only a few of these parliamentary prerogatives, of which their right to summon all citizens before it or its committees, and to extract from their unwilling breasts all secrets by the power of imprisonment, was one, it is answered that heirs, in the absence of a testamentary disposition, take the ancestor's whole estate, and the argument founded upon an alleged inheritance must be abandoned, because it proves too much. But if a partial inheritance is consistent with the argument based upon an alleged heirship, and it be urged that only such powers as were consistent with the changed order of things were taken, then it is insisted that this particular power, so potent for mischief, and aptly termed "*inquisitorial*," could not descend by inheritance to the legislature of either a colony or a republican state. It is inconsistent with the framework of both, and the conceded fact that both took only *conferred* power, and not any by *inheritance*, is a sufficient answer to the suggested argument.

Abstract reasoning, however, is again made unnecessary by the decisions of English courts. In the cases before cited (*Kielley* agt. *Carson*, 4 *Moore's P. C.*, 63; *Fenton* agt. *Hampton*, 11 *Moore's P. C.*, 347, 366; *Doyle* agt. *Falconer*, *L. R.*, *P. C.*, 328; also the *Canada case*, *Landers* agt. *Woodworth*, 2 *Can. Sup. Ct. R.*, 158), this very point now under consideration was expressly decided, and they hold distinctly that the legislatures of the colonies of England did not take the power of parliament to punish for contempt. They have so decided, after full and exhaustive argument, when presided over by judges, whose names and character are world-wide famous, and such decisions, in every judicial forum, should arrest discussion and dispel doubt.

To the suggestion that the constitution of the state adopted

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the statutes in force when it took effect (*art. 1, sec. 17*), and, therefore, validated those which assumed to give power to the legislature to punish for contempt, it is an answer to say, that if unconstitutional they were not "*in force*," but were void, and were not embraced within the language of the constitution; and to the further suggestion that the power which has been exercised over McDonald is one which has long been resorted to, it is sufficient to say, that the existence of power whenever claimed, can be resisted by questioning its bestowment, and that its use by congress for a term almost equally long did not prevent the judicial declaration in the Kilbourn matter, that his imprisonment was unlawful.

It is believed that the various grounds upon which the legality of the imprisonment of McDonald was sought to be justified have now been examined, and the result of such examination is the conclusion, that in the light of the recent decisions in England, that in *Kilbourn agt. Thompson*, and of reason, it cannot be upheld. If McDonald had refused to answer questions in aid of an inquiry in which the senate was authorized to act *judicially*, then the power to commit would follow; and, to guard against any misapprehension, the general statement should be made, when the legislature or either branch thereof, is in the execution of *judicial* functions conferred by the constitution, the power to commit for contempt cannot be doubted. When, however, the inquiry is *for legislative* purposes only, and such it was in the present instance, most careful examination and reflection leads the judge to whom this case has been submitted, to more than doubt the legal existence of the power which has been exercised over McDonald. This, however, is his individual conclusion, supported it is true by the decision in *Kilbourn agt. Thompson*, and those recently made by the privy council in England, but which, though of very high authority, have not yet been adopted in this state. The judicial utterances in cases determined in this state (though in none, with the single exception of *People agt. Learned*, was the direct question involved), are

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against the conclusions herein stated. The contrary rule was affirmed in *Briggs* agt. Mackellar (2 *Abb. Pr. R.*, 30), in *Wickelhausen* agt. Willett (10 *Abb. Pr. R.* 164), and again in same case (*sub nom.* *Wilckens* agt. Willett, 1 *Keys*, 521, 525) in the court of appeals. In the last mentioned case was involved the legality of the arrest of an individual for neglecting to appear before a committee of the house of representatives of the congress of the United States, as a witness, "in a matter," as the stipulation under which it was submitted admitted, "then pending and under investigation by said house, and within its jurisdiction." It did not, and could not, therefore, decide that the power to punish for contempt existed, when the refusal to testify was made in the course of an examination in aid of general legislation; but the existence of such a power is stated, both by judge HOFFMAN in the superior court and judge JOHNSON in the court of appeals, in the most unqualified language. Such utterances, however, were made long prior to the decision in *Kilbourn* agt. *Thompson*, and if that had then been promulgated, they perhaps would never have been announced with the breadth which they now cover. Still they are in conformity with the *dicta* of other judges scattered through the reports and the opinions of various elementary writers, and, therefore, as the practice of this state has been in conformity with such opinions for many years, should not be disregarded by a single judge in judicial action, even though his views may be widely different from theirs.

The need of conservative action in this particular case is enforced not only by the opinions to which reference has been made, but also by one adjudged case, that of the *People* agt. *Learned* (5 *Hun*, 626), in this judicial department. A commission had been created by joint resolution of the legislature (*Laws of 1875*, 823) "to investigate canal affairs," and by an act (*chap. 91 of Laws of 1875*) it was authorized "to compel the attendance of witnesses." One Henry D. Denison had refused to produce before such commission certain books and papers,

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and for such refusal had been committed to the common jail of Albany county. On *habeas corpus* Mr Justice LEARNED had released him from imprisonment, which decision was reversed by the general term of the supreme court, Judge JAMES writing the opinion, and Judge BOARDMAN concurring. It is true that the authority of this case is very much weakened by the fact (vol. 16 of Albany Law Journal, 96) that when the case came before the court of appeals for review, the counsel, who had been successful at the general term, "asked the court not to review it, and stipulated not to enforce the determination, either against the person or the property of Dennison," and that thereupon the court of appeals refused to hear it, but, nevertheless, until reversed it must control this court as now organized. The opinion of Judge JAMES cites no adjudged case, holding that the power which the canal commission exercised was legally conferred, nor is it sustained by any argument therein stated. The conclusion, however, that the decision of Mr. Justice LEARNED should be reversed, can only be justified upon the assumption that the legislature could confer judicial power upon the commission it created, by which alone it could make its inquiry effective. It needs no argument to demonstrate that, if such power could be conferred upon a commission charged with the mere duty of investigation, it could also be conferred upon a committee of either house of the legislature. If that decision is the law of this state, then the imprisonment of McDonald is abundantly justified, and certainly, until reversed, it is the law governing the *action*, if not the *opinion*, of every judge within the department where it was made, when sitting alone and holding a court inferior in dignity to that which announced it.

It is undoubtedly an argument of great force, that since the *dicta* contained in opinions and text books, to which allusion has been made, were written, the supreme court of the United States and the privy council of England have overruled the earlier decisions upon which they rest. This argument has also been carefully weighed, but the judge writing this opinion

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has been unable to reach the conclusion that it would be a wise exercise of power for him, when singly holding a court, to overturn the entire practice of the state. Judges and courts must be conservative and not rash in action. A decision of a single judge, contrary to the practice of years of his own state, contrary to an adjudged case in the tribunal which is his immediate superior, and contrary to the opinion of the higher branch of the legislature of such state, in which are many lawyers of eminent ability, would not command respect and would only create alarm as an abuse of power. The effect of the decision in *Kilbourn* agt. *Thompson*, and those by the privy council in England upon the legislative practice of this state must be determined by a higher tribunal than the one which now deals with the present case. If its decision shall be in conformity with the views expressed in this opinion, the relator will not be remediless; and if it shall be adverse to such views, then the conclusion reached—that Mr. McDonald must be remanded to the custody of the sheriff of Albany county, to be held by him under the senate's warrant of commitment—will not interfere with the exercise of a power which the body exercising it claims to possess, and which it supposes it is wielding for the best interests of the state.

In conclusion, a word should be added upon a point made in behalf of McDonald, to the effect that the Penal Code has taken from the legislature all power to punish for contempt. The argument is that, by section sixty-nine of such Code, if he unlawfully refused "to answer any material and proper questions" asked by the senate's committee, he could be indicted for a misdemeanor, and as his offense was thus punishable according to the provisions of such Code it was to be punished thereunder "and not otherwise" (*Sec. 719*). This is specious but not sound. The Penal Code prescribes and relates to the "*punishments*" to "be inflicted only upon a legal conviction in a *court* having jurisdiction" (*sec. 9*); and the Code of Criminal Procedure prescribes "the manner of prose-

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cuting and convicting criminals" (*Sec. 8*). The object of section 719 was to declare when the old penalties attached to crime, *on conviction after a prosecution in and before a competent court*, and when the new were applicable. After declaring that the provisions of the Code should have no retroactive effect, it explicitly states that "an offense committed or other act done, at any time *before* the day when this Code takes effect * * * must be punished according to * * * the provisions of law existing when it was done or committed;" while one "committed *after* the beginning of the day when this Code takes effect, must be punished according to the provisions of this Code, and not otherwise." A general statute, as a rule, does not repeal a special one, and therefore a general code of laws relating to the penalties which *courts* must impose on *convictions* for crime according to the usual mode of procedure do not repeal special provisions to punish summarily for contempt. The words "not otherwise" in such section simply forbid courts, in punishing criminals for offenses to which the penalties of the Code are applicable, to do so "otherwise" than as such Code provides. It is unnecessary to pursue this point further. A comparison of the various sections with each other, and the language of the whole of section 719, and not of a single paragraph read alone, make the meaning clear. If all power of the legislature to punish summarily for contempt is repealed, then all, which courts had, has also vanished; and if the latter had been swept away, as there was no punishment by the court summarily for contempt, it was useless to declare, as has been by section 680, than an act "punishable as a contempt of court" was also "punishable as a crime." This recognizes that the provisions as to court contempts are not repealed by the Penal Code; and if those are not, then legislative contempts are not, for both are punishable under such Code as misdemeanors.

It remains only to be said that to a higher court than the present, the very grave questions involved in the present pro-

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ceeding are committed, in the hope, however, that the views expressed in this opinion will, even though not adopted, aid in arriving at a sound and judicious conclusion thereon. If the labor and thought which have been given to the subject shall, in any way, assist the tribunal of review, he, who has given to it much of both, will be fully compensated.

SUPREME COURT.

In the Matter of the Petition of the UNITED STATES for the appointment of commissioners, pursuant to chapter one hundred and forty-seven of the Laws of the state of New York of the year one thousand eight hundred and seventy-six, as amended by chapter three hundred and forty-five of the Laws of one thousand eight hundred and seventy-nine.

Constitutional law — Constitutionality of chapter 147 of the Laws of 1876, in relation to the improvement of the Harlem river and Spuyten Duyvil creek, and the various acts amendatory thereof, upheld.

On a motion to vacate and set aside several orders and proceedings thereunder or subsequent thereto, which had for their object the carrying into effect the various statutes in relation to the improvement of the Harlem river and Spuyten Duyvil creek, on the ground that chapter 147 of the Laws of 1876, chapter 345 of the Laws of 1879, chapter 65 of the Laws of 1880, chapter 61 of the Laws of 1881, chapter 387 of the Laws of 1882, chapter 410 of the Laws of 1882 and chapter 214 of the Laws of 1883 are, and each of them is, unconstitutional and void, as being in contravention of section 6 of article 1, and also of section 11 of article 8 of the constitution of the state of New York:

Held, first, that the purposes to which the land sought to be taken in these proceedings are to be devoted are public within the meaning of our constitution. The use being in its nature public, the legislature are the sole judges of the question whether the benefit to our citizens or to the state is such as to warrant the taking of private property therefor, and are also the sole judges of the question of the supervision or control over the use, which should be retained in order to secure the contemplated public benefits.

Second. A court at special term should not declare an act to be in conflict

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with the provisions of the Constitution of the United States or of the state, unless its conflict with those provisions is clearly apparent.

Third. That the acts are not unconstitutional in that private property condemned is not taken for a public use within the meaning of the constitution.

Fourth. That a sure pledge is given to the owners of lands taken that they shall be paid before possession of the lands is taken under the acts, and the act is not subject to the criticism that a first, sure and certain compensation is not secured to said owners for the value of their property.

Fifth. Nor can it be said that the lands in question are proposed to be taken without due process of law. If the acts are valid, the taking is by due process of law.

Sixth. Nor are the proceedings invalid because they were not instituted by the United States district attorney for this district.

Seventh. That the widening, deepening and improvement of the Harlem river, as contemplated by the acts is a city purpose. The improvement, if carried out, will develop that portion of the city which fronts upon the Harlem river, and will bring into closer communication the parts of the city which lie upon either side of the river, which river now runs exclusively within the city limits.

Eighth. That if the acts of the legislature are constitutional in other respects a private individual cannot raise the objection that the lands of the city have been illegally given away.

Ninth. That the objections to the acts cannot be sustained on the ground that the assessments take from the party assessed private property for the public use. The legislature has power to take lands under eminent domain and to pay for them by assessments on the land benefited thereby.

Tenth. That the constitution does not require that the title of an act should specify all of its provisions. In this case the general subject is expressed in the title, which is the single one of acquiring the right of way, and what is necessarily incidental to it for the improvement of the Harlem river, and although there are changes in the details for carrying out the scheme of the improvement, the general subject of all the acts remains the same.

New York, Chambers, February, 1884.

Samuel E. Lyon and Thomas L. Ogden, for petitioners, in opposition to motion.

D. G. Crosby and Gratz Nathan, for Dykman and others, in opposition to motion.

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Franklin Bartlett, for Henry W. T. Mali and others, objectors, for the motion.

Hamilton Odell, for W. B. Isham, objector.

Charles E. Miller, for contestants.

LAWRENCE, J.—This is a motion to vacate and set aside the several orders made herein on the 24th, 27th, and 31st days of October, 1879, and all proceedings thereunder or subsequent thereto, on several grounds :

First. That chapter 147 of the Laws of 1876, chapter 345 of the Laws of 1879, chapter 65 of the Laws of 1880, chapter 61 of the Laws of 1881, chapter 387 of the Laws of 1882, chapter 410 of the Laws of 1882, and chapter 214 of the Laws of 1883, are and each of them is unconstitutional and void, as being in contravention of section 6 of article 1 of the constitution of the state of New York, because :

“1. The said act or acts do not provide for the acquisition of the lands therein described and referred to by due process of law.

“2. That the said act or acts do not provide just compensation for the lands taken or sought to be taken.

“3. The use for which the lands therein described or referred to is set apart, is not a public use.

“*Second.* That said acts are and each of them is unconstitutional and void, as being in contravention of section 11 of article 8 of the constitution of the state of New York, because it is sought thereunder to allow the city and county of New York to incur an indebtedness for purposes other than city or county purposes.

“*Third.* That all the proceedings heretofore taken herein or now pending under said acts, are unconstitutional, void and illegal.

“1. Because the right of eminent domain cannot be exercised by the state of New York for the benefit of the United States.

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"2. Because the congress of the United States has passed no act, bill or resolution authorizing the said proceedings or the taking of lands therefor, and has not consented to the United States becoming a party to the proceedings.

"3. Because the so-called Harlem river improvement is a private scheme, uncertain of accomplishment, and to the execution or accomplishment of which the United States is in no way pledged.

"4. Because the attorney for the United States for this district did not bring or institute the proceedings, and has taken no part in them, but the movers in this matter, unwarrantably and without authority of law, pretend to represent the United States herein.

"5. Because the petition itself is not verified by any duly authorized official or person, but is verified by one John Newton, an engineer in the federal service, who has verified said petition, without having been legally authorized so to do.

"The order of the 24th October, 1879, referred to in the notice of motion which is entitled as hereinbefore set forth, recites: 'That the above entitled matter having come on to be heard upon the petition herein, dated October 8, 1879, of the United States, by John Newton, the engineer in charge of the improvements for the United States therein mentioned.'

"Now, upon reading and filing said petition and notice of presentation thereof, and proof or admission of due service of a copy of said petition and notice upon the persons whose estates or interests in the parcel of real estate hereinafter mentioned are to be affected by these proceedings, or upon their attorneys or guardians who have appeared herein, and a guardian *ad litem* having been duly appointed for the infants interested therein, and on all the proceedings herein, and after hearing Mr. Samuel E. Lyon, of counsel for said petitioner, and Messrs. F. & H. L. Morris, attorneys for Henry W. T. Mali, and Mr. Fordham Morris, guardian *ad litem* for Henry L. Cammann and Isabella M. Cammann, and on motion of Mr. Thomas L. Ogden, attorney for said petitioner, it is

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ordered, that William R. Grace, William F. Smith and James D. Fish, three disinterested and competent persons who reside in the city of New York, be and they hereby are appointed commissioners of estimate and assessment to ascertain and appraise the compensation to be made to the said Henry W. T. Mali, &c., according to their several interests in said real estate, &c., and also the amount to be assessed upon the real estate in front of and benefited by such improvement."

The orders of the 27th and 31st days of October, 1879, referred to in the notice of motion, I do not find among the papers, but I assume, from the statements of counsel and from the arguments presented on the hearing of the motion, that they also related to the appointment of commissioners of estimate and assessment, under the various acts the validity of which is now assailed.

It is proper that I should state, before proceeding to the consideration of the question to be determined on the disposition of this motion, that the general term of this department, in an opinion very recently filed, has sustained the legality of the counsel fee and compensation charged by the counsel and attorney for Major John Newton, upon whose application on behalf of the United States the order or orders appointing commissioners of estimate and assessment was or were made. It also appears, from the papers in the case, that a motion has been made for the confirmation of the report of the commissioners of estimate and assessment, and that the same has been adjourned from time to time, but that said motion has never been fully heard or decided. Also that proceedings are now going on before a referee to determine the amount of the costs and expenses of the proceedings.

The first suggestion which presents itself to the court when called upon to determine the constitutional objections to the acts in question, which have been so elaborately presented by counsel, is that this motion is premature, for the reason that if it be conceded that the acts are obnoxious to the criticism made upon them by the counsel for the objecting parties,

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inasmuch as the report of the commissioners has never been and may never be confirmed, said parties are as yet not injured, or put in jeopardy as to any of their rights, by the proceedings already taken. Recent decisions have, however, sustained the position that it is proper to present the questions raised on the motion, on an application to the court to vacate the orders already made and the proceedings already taken, and in obedience to those decisions I shall proceed to examine some of the points made upon the motion (*See in the Matter of the City of Buffalo*, 78 N. Y. R., 362; *In the Matter of the Department of Public Works*, 85 N. Y. R., 459; *In the Matter of Cooper*, 28 Hun, 515).

In doing so I shall follow rather the order in which said points are presented in the briefs of the parties, than that in which they are stated in the objections.

The first point made is that the state of New York cannot condemn lands for the use of the general government, because the right of eminent domain cannot be exercised by one sovereignty for the uses of another, and in support of this position the case of *Kohl* agt. *The United States* (1 Otto, 367), and *Twombly* agt. *Humphrey* (23 Mich., 471), and *Darlington* agt. *The United States* (82 Penn., 382), are cited. Before speaking of these cases it will be well to examine a case decided by the court of appeals in our own state, which, I think, disposes of this objection adversely to the parties taking it. In the case, *In the Matter of Peter Townsend* (39 N. Y. R., 171), it was held that an act of the legislature taking land in this state for the public use is not unconstitutional, because the instrumentality employed for that purpose is a corporation created by the laws of another state, nor because such corporation derives a pecuniary benefit from the use of the land so appropriated, nor because the lands appropriated are to be used for the maintenance of a navigable canal *which runs along the border of the state and without its limits*, and it is in that case declared that if the use be in its nature public, the legislature are the sole judges of the question whether the

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benefit to our citizens or to the state is such as to warrant the taking of private property therefor, and are also the sole judges of the question, *what supervision or control over the use should be retained in order to secure the contemplated public benefit.*

In that case judge WOODRUFF, in his opinion, says: "It is far too late in the history of legislation and adjudication, in this country and in this state, to claim that private property may not be taken for what in common parlance are called public improvements, such as railroads and canals, with their incidental and reasonable conveniences and appurtenances, notwithstanding the work is done by individuals or a corporation who are to derive a pecuniary benefit therefrom, if the legislature deem it for the public interest (*Bloodgood agt. The Mohawk and Hudson Railroad*, 18 Wend., 9). Continuing, the learned judge says: 'If, then, the use is public, and the power to take and appropriate may be conferred upon individuals or corporations, I know of no restraint upon the legislature in the selection of the parties to whom the power to take and apply shall be delegated. Certainly, the constitution contains neither prescription nor limitation. It is clear, I think, and has so been uniformly held, ever since the case above referred to, that as to the instrumentality employed and the manner in which the property shall be taken and applied to the public use, the legislature are the sole judges. Their supreme power over the subject is qualified only by the three particulars: The use must be public, compensation must be given, the amount required as compensation must be ascertained by a jury or by not less than three commissioners appointed by a court of record.

"It has been said that the right of eminent domain implies the right in the sovereign power to determine the time and occasion, and as to what particular property it shall be exercised (*Heyward agt. The Mayor*, 7 N. Y., 314). This can hardly be supposed to import that the legislature can, by its mere declaration, override the constitution; that by de-

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declaring the use to the public, when it is within the constitution a private use, it can authorize the property of one citizen to be taken from him and given to another for a compensation to be ascertained in the manner above stated, but only that where the use for which the property is desired is in its nature public, the legislature are the supreme and final judges of the question whether the public necessity or benefit is such as to call for the exercise of the power; whether the time is a fitting one; what particular property may be taken, and in what manner in respect to the instrumentality to be employed for the purpose — whether state officers, individuals or corporations. All these are purely matters of discretion within the exclusive cognizance and jurisdiction of the legislature, and in those matters I apprehend no court can review its action."

It cannot be doubted that the purposes to which the land sought to be taken in these proceedings are to be devoted are public, within the meaning of our constitution. The general scope and tenor of the various acts under which the proceedings were instituted is to the effect that the United States shall acquire a right of way for the improvement of the Harlem river and Spuyten Duyvil creek, from the North river to the East river, through the Harlem Kills, and ceding jurisdiction over the same. The general use may, I think, be regarded as a public use for the people of the whole United States, but it is quite obvious that the improvement of the Harlem river and Spuyten Duyvil creek would result in a use specially beneficial not only to the city of New York but to the people of the state of New York, and this use would necessarily confer greater benefit upon the people of this city and of this state, and upon those owning adjoining property, than would result to the people of the United States. At all events, sitting as a justice at chambers, and keeping in mind the broad and extensive construction given to the words "public use," in the case of *Townsend*, before referred to, and remembering that the court in that case has decided that, *if the use be in its nature public*, the legislature are the sole judges of the question

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whether the benefit to our citizens or to the state is such as to warrant the taking of private property therefor, and are also the sole judges of the question of the supervision or control over the use, which should be retained in order to secure the contemplated public benefits, I cannot say that the acts in question are unconstitutional, because the use to which the lands proposed to be taken are to be devoted is not public. The legislature may well have thought that in the interest of commerce and navigation generally it was desirable that the United States should acquire the title to the lands in question, and yet may also have thought in view of the peculiar interests which the people of the state of New York, and particularly to the city of New York, had in the improvement of the Harlem river, the use was for the benefit specially of the people of the state and city of New York.

In the case just referred to the corporation was created under the laws of New Jersey. Its canal ran from the Delaware river in New Jersey to the Hudson river at a point opposite the city of New York, and the title upon the consummation of the proceedings became vested in this foreign corporation. But it is contended that while the case of *Townsend* is controlling upon the point, that the right may be given to a corporation of a sister state, or to individuals residing therein, to take lands for the public use in the state of New York, the reasoning of the case does not lead to the conclusion that the state of New York can condemn lands for the use of the general government, because the right of eminent domain cannot be exercised by one sovereignty for the uses of another. As I have said, the cases of *Kohl* agt. *The United States* (1 *Otto*, 367), and *Twombly* agt. *Humphrey* (23 *Mich.*, 471), and *Darlington* agt. *The United States* (82 *Penn.*, 382), are cited in support of this view. In the case of *Kohl* agt. *The United States* this question did not necessarily arise because there the proceedings were instituted by the United States by an act of congress to appropriate a parcel of land in the city of Cincinnati as a site for a post-office and other pub-

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lie uses, and there the proceedings were instituted in the circuit court of the United States for the southern district of Ohio, and it was decided that the right of eminent domain exists in the government of the United States, and may be exercised by it within the states so far as necessary to the enjoyment of the power conferred upon it by the constitution. The case did not necessarily involve the question whether an act of the legislature of the state of Ohio, authorizing proceedings to be taken for the acquisition of the desired land in the state courts, for the use and benefit of the United States, would have been invalid and unconstitutional. It is true that justice STRONG, in delivering the opinion of the court, stated that "in some instances the states by virtue of their own right of eminent domain have condemned land for the use of the general government, and such condemnation have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in *Gilmore* agt. *Lime Point* (18 Cal., 229), where lands were condemned in a state court and under a state law for a United States fortification. A similar decision was made in *Burt* agt. *Merchants' Insurance Company* (106 Mass., 356), where land was taken under a state law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the federal government to have land in the states condemned for its use under its power and by its own action. The question was whether the state could take lands for any other public use than that of the state. In *Twombly* agt. *Humphrey* (23 Mich., 471), a different doctrine was asserted, founded, we think, upon a better reason. The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that there exists no necessity, which alone is the foundation of the right. If the United States have the power it must be complete in itself. It can neither be enlarged nor diminished by a state, nor can any state prescribe the manner

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in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and the right of exclusive legislation after the land shall have been acquired."

If the direct point had been in issue in that case as to whether a statute of a state conferring the power to take lands for the public use, which was beneficial to the people of the United States, and especially beneficial to the people of the state, was unconstitutional, the case would have been absolutely controlling, but, as before observed, such was not the case. The proceedings were taken under an act of congress; they were taken in the United States court and an argument was made by the counsel for the plaintiffs in error to the effect that as for upwards of eighty years no act of congress had been passed for the exercise of the right of eminent domain in the states, and as congress had never given to the circuit court jurisdiction of proceedings for the condemnation of property brought by the United States in the assertion or enforcement of that right, a change of policy by congress should not (to use the language of counsel) be supposed unless the act was explicit. I agree with the learned counsel who argued this matter in opposition to the objections, that there was in fact no constitutional question in the case, because the counsel in that case admitted that the right of eminent domain exists in the government of the United States, and I also agree that the only disputed question in the case bearing on the subject was upon the construction of the act, whether the act of congress itself authorized the secretary to take the necessary steps to condemn the land.

In the case of *Twombly* agt. *Humphrey* (23 Mich., 473), decided by the supreme court of Michigan, is directly in point, but opposed as it is to the well considered determination of the supreme court of Massachusetts in *Burt* agt. *Merchants' Ins. Co.* (106 Mass. 356), and the decision of the supreme court of the state of California in *Gilmer* agt. *Lime Point* (18

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Cal., 229), I do not feel constrained to follow it after the very broad definition of the term "public use," which is given *In the Matter of Townsend* (39 *N. Y.*, 171), before referred to. The opinion in the California case, delivered by Mr. justice BALDWIN, seems to me to be an exceedingly thorough exposition of the power of the state in the exercise of the right of eminent domain (*See particularly the observations of the learned justice on pp. 255 to 260*).

The case of *Darlington* agt. *The United States* (82 *Penn.*, 382) supports the view maintained by the supreme court of Michigan, and is adverse to that expressed by the supreme courts of Massachusetts and California. Taking the view most favorable for the objecting parties, it can only be said that there may be doubts under the decisions rendered in other states as to the constitutionality of these acts, and in such a case it has been held that a court at special term should not declare an act to be in conflict with the provisions of the Constitution of the United States or of the state, unless its conflict with those provisions is clearly apparent, and as the reasoning in the leading case in this state, to wit, *The Matter of Townsend* (39 *N. Y.*, 171), seems to me to support the validity of these statutes so far as the point now under consideration is concerned, I think that they must be held to be constitutional (*See, again, particularly the observations of BALDWIN, J., in Gilmer* agt. *Lime Point*, 18 *Cal.*, 255).

The observation just made disposes of the second objection urged upon this motion as to the constitutionality of these acts, which is, that said acts are unconstitutional, in that private property condemned is not taken for a public use within the meaning of the constitution. It is also urged that the acts of the legislature in question are unconstitutional and void, because they attempt to take private property without making any just compensation therefor. I do not think, however, that the acts, as amended at the time this motion was argued, were obnoxious to this criticism. It will be remembered that the lands of the objecting party have not as yet been taken

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under these proceedings. The first section of the act of 1883, amending section 5 of chapter 65 of the Laws of 1880, provides that upon the confirmation of said report of assessment, the comptroller of the city of New York is hereby authorized to raise upon the assessment bonds of the city of New York, in the manner now provided by law, a sum not exceeding \$200,000, and to *pay therefrom* the several sums awarded to the persons and parties as owners or interested in the lands and premises taken or to be taken for the purposes of said improvement, as the same shall appear by the report of the commissioners of estimate, and in pursuance of the provisions of the act hereby amended, and as amended when confirmed, and the expenses, charges and disbursements of the proceedings taken under said acts and under the same as hereby amended as taxed and certified by a justice of the supreme court.

Provision is also made by this act for the cases of awards to unknown owners, or to persons who shall decline to receive the same, for depositing the amount of said awards in the New York Life Insurance and Trust Company of the city of New York, to the credit of such persons or party in interest, or unknown owner, and the act provides *that thereupon the United States shall be entitled to enter upon, take possession of, and use the said lands or premises for the purpose of said improvement, and all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in said lands, &c.*

Thus it seems to me that a sure pledge is given to the owners of lands taken, that they shall be paid before possession of the lands is taken under the acts, and the act is not subject to the criticism that a just, sure and certain compensation is not secured to said owners for the value of their property (*See Sage agt. The City of Brooklyn*, 89 N. Y., 189, and cases cited at p. 195).

Assuming that the positions, above taken are sound, it cannot be said that the lands in question are proposed to be

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taken without due process of law. If the acts are valid, the taking is by due process of law. Nor can I, on this motion, hold that the proceedings are invalid because they were not instituted by the United States district attorney for this district. The recent opinion of the general term of this department sustaining the right of Messrs. Lyon and Ogden to compensation claimed under these acts renders it unnecessary for me to say more upon this point. If the proceedings had no validity whatever because they were not instituted by the district attorney of the United States for this district, no compensation could legally have been awarded to the attorney and counsel conducting them.

It is also contended that the acts in question are unconstitutional and void, because it is sought thereunder to allow the city and county of New York to incur an indebtedness for purposes other than city and county purposes (*See sec. 11 of art. 8 of the Const. of the State of New York*). I have already endeavored to show that the use of the lands proposed to be taken is not only a public use, beneficial to the people of the entire nation, but also to the people of the state, *and particularly to the people of the city*, and the observations of judge EARLE in delivering the opinion of the court in the *Brooklyn Bridge case* (*see People ex rel. Murphy agt. Kelly, 76 N. Y., 487*), seem to me to be pertinent on this point, and to establish, if I am correct in my understanding of the benefits to be derived by this city from the improvement in question, that the moneys authorized to be raised by the city will be devoted to a city purpose.

The learned justice, at page 487 says: "Nor can it be said that the indebtedness authorized to be incurred by the cities for the construction of the bridge was not for a city purpose. It is impossible to define, in a general way with entire accuracy, what a city purpose is within the meaning of the constitution. Each case must largely depend upon its own facts, and the meaning of these words must be evolved by a process of exclusion and inclusion in judicial construction. It could not

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be a city purpose for the city of New York to build a railroad from that city to Philadelphia, or to improve the navigation of the Hudson river generally between that city and Albany, although incidental benefit might flow to the city. Such works have never been regarded as within the legitimate scope of municipal government. On the contrary, it would be a city purpose to purchase a supply of water outside of the city, and convey it into the city, and for such a purpose a city debt could be created. So, lands for a park for the health and comfort of the inhabitants of a city, could be purchased outside the city limit, and yet conveniently near thereto. Such improvements are for the common and general benefit of all the citizens, and have always been regarded as within the scope of municipal government; and so, too, highways or streets leading into a city or village, may be improved provided the improvements be confined within such limits that they may be regarded as for the common benefit and enjoyment of all the citizens."

I think that under the definition above given of a city purpose, it may fairly be contended that the widening, deepening and improvement of the Harlem river, as contemplated by the acts under consideration, is a city purpose. The improvements, if carried out, will develop that portion of the city which fronts upon the Harlem river, and will bring into closer communication the parts of the city which lie upon either side of the river. It should be remembered, in considering this subject, that the Harlem river now runs exclusively within the city limits.

As to the sixth point in the brief submitted by the counsel for Mr. Mali, it seems to be sufficient to say that if the acts of the legislature are constitutional in other respects, a private individual cannot raise the objection there sought to be taken (*See observations of Judge FISCH in People agt. Brooklyn, Flatbush and Coney Island Railroad*, 89 N. Y., 93). If the lands of the city have been illegally given away, it will be time enough to consider that question when the city complains.

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The objections to the acts cannot be sustained on the ground that the assessments take from the party assessed private property for the public use. Since the case of the *People* agt. *The Mayor, &c., of New York* (4 Comst., 419), it cannot be asserted that a public improvement in which the land is taken under the power of eminent domain may not be paid for by assessments imposed under the taxing power of the state upon the lands of the owners of adjacent or surrounding property which are deemed to be benefited by the improvements. In other words, the powers may be exercised in reference to the same improvements (*see opinion of RUGGLES, J., at page 436, in which he says that the case of Livingston* agt. *The Mayor, &c., of New York*, 8 Wend., 85, 101), "affords an example of the exercise of the two powers before mentioned, that is, the power of eminent domain and the power of taxation; the first in taking the land for the use of the street, and the second in requiring contribution to defray the expenses of improving it from that class of persons on whom the burthen ought to fall. The case affirms the validity of street assessments in virtue of the latter power."

The case of the *People* agt. *The Mayor, &c., of Brooklyn*, is conclusive as to the power of the legislature to take lands under eminent domain and to pay for them by assessments on the land benefited thereby. That is precisely what the legislature has done by the acts under review. The subject is the improvement of the Harlem river, which is beneficial to the whole city, but specially beneficial to those lands which are within the area of assessments laid out by the commissioners. So, the opening of any street or avenue in the city is beneficial to all the people of the city, but although the land is taken for public use, it can legally be paid for by moneys raised by assessment upon the lands of those who are pecuniarily benefited by the improvement.

It seems to me that the position of the counsel for the commissioners, that the subject of the acts is the single one of acquiring the right of way, and what is necessarily incidental

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to it for the proposed improvement, is correct. Although there are changes in the details for carrying out the scheme of improvement, the general subject of all the acts remains the same. The constitution does not require that the title of an act should specify all of its provisions. In speaking of this subject, in the case of the *Sun Mutual Insurance Company* agt. *Mayor, &c., of New York* (4 *Selden*, 252), the act under consideration being the annual tax levy of the city of New York, GARDINER, J., observes: "The title of the act embraces but one subject—the power to tax conferred upon the board of supervisors, and is so far a compliance with the constitution. When we look at the body of the statute we find that subject regulated and modified by special provisions, and the objects designated for which the taxes are to be levied. But these, it seems to me, are not distinct subjects within the meaning of the sixteenth section. If the power granted to levy the tax is one subject which has not been questioned, then if the mode in which that power is to be exercised is another, there would be no way of complying with the constitution except by embodying the whole act in the title." And again he says, on page 253: "There must be one subject, but the mode in which the subject is treated, or the reasons which influenced the legislature, could not and need not be stated in the title, according to the letter and spirit of the constitution" (*See, also, Brewster* agt. *City of Syracuse*, 19 *N. Y.*, 116).

In that case James Ley and son had constructed a sewer under a contract with the city of Syracuse, and had been paid the full price stipulated in the contract. Afterwards a law was passed (*chap. 14, Laws 1857*), entitled an act for the relief of James Ley & Son, by which the common council of Syracuse was empowered to assess and collect in the same manner as the expenses of constructing the sewer were by law authorized to be assessed and collected, the sum of \$600, and to pay it over to Ley & Son for the construction of said sewer, in addition to the contract price. The city was by its charter prohibited from paying any compensation above the contract

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price, but could only do so in virtue of such special act. In that case JOHNSON, C. J., said (it being objected that the law was unconstitutional): "The title of the act is, an act for the relief of James Ley & Son. The substance of the act is that power is conferred on the common council of Syracuse to assess, collect and pay to James Ley & Son, contractors, for the construction of a sewer in that city, \$600 in addition to the contract price. This constitutes but a single subject. The whole provision is framed to produce a single result — the relief of James Ley & Son. The different steps by which this relief is to be brought about are not distinct subjects, but are minor parts of the one general subject. This general subject is expressed in the title. The degree of particularity with which the title of an act is to express a subject is not defined in the constitution and rests in the discretion of the legislature (*Sun Mut. Ins. Co. agt. New York*, 4 *Selden*, 241). An abstract of the law is not required in the title, and its actual subject is in this law clearly and appropriately expressed."

I do not regard the more recent decision of the court of appeals, *In the Matter of Blodgett* (89 *N. Y.*, 392), as being in conflict with the decision of the court of appeals above referred to. In that case the act was entitled "An act in relation to regulating and grading the Eighth avenue, in the city of New York." It was held that, as the act authorized the commissioners of public parks to change the grade of streets intersecting said avenue to conform to the grade thereof, it was repugnant to the provision of the constitution of the state now under consideration, and it was accordingly held that an assessment for grading an intersecting street was void. The grading of the Eighth avenue was a subject distinct and complete in itself. It did not necessarily follow that such grading would require that the intersecting streets should also be graded. The title of the act did not therefore express that subject, relating as it did solely to the regulating and grading of the Eighth avenue. From reading its title no one would be apprised of the fact that the intersecting streets were to be regu-

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lated or graded. Here the subject, as I have before stated, is the acquiring of the right of way, and what is necessarily incidental to it for the improvement of the Harlem river for the purposes stated in the act. But if there is doubt upon this last point, it is not sufficiently grave to justify me in declaring upon a mere motion that the acts in question are invalid. Every presumption is in favor of the constitutionality of the acts of the legislature. It is only in cases of a clear and substantial departure from the provisions of the fundamental law, that courts will declare acts of the legislature invalid (*Gilbert Elevated Railway* agt. *Anderson*, 3 *Abb. N. C.*, 434; *People* agt. *Canal Board*, 55 *N. Y.*, 390; *In the Matter of the Metropolitan Gas-Light Co.*, 85 *N. Y.*, 527).

For these reasons I am of the opinion that the motion should be denied, with costs.

NOTE.—Affirmed by March general term, DAVIS, P. J., DANIELS and HAIGHT, JJ., on foregoing opinion. [Ed.]

D I G E S T

CONTAINING THE WHOLE OF

66 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 30 HUN, AND 92 AND 93 N. Y. REPORTS.

Attention is called to the four additional headings "CODE OF PROCEDURE," "CODE OF CIVIL PROCEDURE," "CODE OF CRIMINAL PROCEDURE" and "PENAL CODE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of the Codes.

ACTION.

1. Where C. died leaving an only daughter named Ella about eight years of age, leaving a last will and testament by which he gave all his property to this daughter, with the income and profits thereof; and by it he also desired his executor, the defendant S., to take charge of his property, rent out the real estate, take care of his household furniture and other property until his daughter attained the age of twenty-one years, and requested his executor should provide his child with a suitable home and see to her education and pay for the same out of his said property, and to sell and convey his real estate at any time during the minority of his said daughter, and also sell his furniture at any time in his judgment it will be for the interest of his said child. The defendant G. was appointed the general guardian of the child Ella and placed her at school with the plaintiff, and there is due to the plaintiff for board and tuition and supplies furnished to the child \$434.68. In an action brought to procure the application of the money of the child to the payment of the plaintiff's claim:

Held, that the fund in the hands of the executor is held in trust for that purpose and its application can be enforced by the courts.

Held, also, that it is immaterial what the action is called which is instituted to enforce this duty resting on the executor. There is now but one form of civil actions, the distinction between legal and equitable remedies being abolished, and if the case made by a party entitles him to any remedy it must be granted where an answer has been interposed even in disregard of the prayer for relief.

Held, further, that it was proper to make the infant child and her general guardian as well as the executor parties to the action. (*Bulkley* agt. *Staats*, ante, 257.)

2. An action may be brought under the Code of Civil Procedure (*sec.* 1937), after the recovery of a judgment against joint debtors, by the judgment creditor "against one or more of the defendants who were not summoned in the original action," although the defendants served have appealed and have given the security, which under said Code (*sec.* 1310) "stays all proceedings to enforce the judgment appealed from." (*Morey* agt. *Tracey*, 92 N. Y., 581.)
3. The second action is not brought to enforce the judgment, but to establish the liability of the defendants not served, which is not determined by such judgment. (*Id.*)

Digest.

ADDITIONAL ALLOWANCE.

1. A railroad company was authorized to construct its road along an abandoned canal from Rochester to Cuba. To avoid a heavy grade it proposed to leave the line of the canal near the village of Nunda, pass to the west of it and again strike the line of the canal. An action, brought by The People to have the road enjoined from leaving the line of the canal and to compel it to construct its road along the line thereof, was decided in favor of the defendant. Upon an application by the defendant for an extra allowance, affidavits were read tending to show that the new route could be much more cheaply constructed and operated by the company than could the old one: *Held*, that the court properly denied the application upon the ground that the value of the subject-matter involved, upon which the allowance must be based, was not shown by the affidavit. (*People* agt. *Genesee Valley Canal R. R. Co.*, 30 *Hun*, 565.)
2. An additional allowance cannot be granted, upon overruling or sustaining a demurrer with leave to answer over, on payment of costs; but only, if at all, when the final judgment is pronounced that unconditionally terminates the action and fixes absolutely the right of the successful party to tax his costs under the Code. (*De Stuckley* agt. *Tehuantepec R. Co.*, 30 *Hun*, 34.)
2. A fact once admitted by a corporation, through its officer, properly acting within the scope of his authority, is evidence against it, and the doctrine of estoppel applies thereto. (*O'Leary* agt. *Board Ed'n*, 93 *N. Y.*, 1.)
3. Where a defendant has been arrested by virtue of an order of arrest, issued upon *ex parte* affidavits averring fraud in the contraction of the debt sued upon, his omission to make a motion to vacate the order cannot be considered as an admission of the truth of the averments, and does not make the affidavits competent evidence upon trial of the action. (*Talcott* agt. *Harris*, 93 *N. Y.*, 567.)

AFFIDAVIT.

ADMISSIONS AND DECLARATIONS.

1. The rule allowing the silence of a person to be taken as an implied admission of the truth of allegations spoken or uttered in his presence, does not apply to silence at a judicial proceeding or hearing. (*People* agt. *Willett*, 92 *N. Y.*, 29.)
2. In an affidavit on an application for an attachment the *cause of action* was stated on *information and belief*, but the *non-residence* of the defendants was alleged *positively*. On motion to vacate the attachment:
Held, that the cause of action being stated on information and belief, and the sources of the information not being given, the attachment must be vacated. Such a verification is proper in a pleading but not in an affidavit to obtain an attachment. (*King* agt. *Southwick*, *ante*, 282.)

Digest.

See ATTACHMENT.*Smodbeck* agt. *Sisson*, ante, 220.*Reilly* agt. *Sisson*, ante, 224.*Smodbeck* agt. *Sisson*, ante, 225.*Reilly* agt. *Sisson*, ante, 229.*See* SUMMONS.*Donnelly* agt. *West*, ante, 428.

3. Where a defendant has been arrested by virtue of an order of arrest, issued upon *ex parte* affidavits averring fraud in the contraction of the debt sued upon, his omission to make a motion to vacate the order cannot be considered as an admission of the truth of the averments, and does not make the affidavits competent evidence upon trial of the action. (*Talcott* agt. *Harris*, 93 *N. Y.*, 567.)

ALIMONY.

1. Title 1, chapter 15 of the Code of Civil Procedure, does not change articles 1, 2, 3, 4 and 5 of title 1, chapter 8, part 2 of the Revised Statutes, and as alimony and counsel fees were allowed in an action to annul a marriage while those portions of the Revised Statutes were in force, that power still continues under the Code of Civil Procedure (*Henkel* agt. *Henkel*, special term decision of this court, *INGRAHAM, J.*, decided in November, 1883, not followed; *Sullivan* agt. *Sullivan*, special term decision of this court, *O'GORMAN, J.*, decided in October, 1883, followed). (*Lee* agt. *Lee*, ante, 207.)

2. Where a final decree has been made in an action for divorce on the ground of adultery, directing the payment of alimony by the defendant during the life of the plaintiff:

Held, that the obligation to pay such alimony is a personal one, and the decree must be construed to mean during the lives of both parties, and upon the death of the defendant the right to the same is at an end, and no action can be

maintained by the wife against the representatives of the husband's estate for alimony which may subsequently accrue. (*Field* agt. *Field*, ante, 346.)

AMENDMENT.

1. In action brought against four defendants the answer was duly verified by one and was served September twelfth, and on September twenty-ninth plaintiff served notice of motion to strike out the answer of defendants as to the other three, and as to them to treat it as a nullity for the reason that they were not united in the verification. On October second, and within twenty days after the service of the first answer, the defendants served an amended and properly verified answer by all the defendants, who united in the verification thereto:

Held, that the service of the amended and properly verified answer is a perfect answer to this motion, and must defeat the same but without costs.

Held, also, that as the plaintiff was right in serving notice of motion, because the first answer was improperly verified, no costs should be allowed to defendants. (*Rider* agt. *Bates*, ante, 129.)

2. Where a summons issued out of the marine court of the city of New York, in an action wherein an attachment and order directing service by publication was granted, stated the time within which defendant was required to answer at six days, instead of ten, as required by the Code of Civil Procedure (*sec.* 3165, *subd.* 2): *Held*, that the defect was not a jurisdictional one but an irregularity merely; that the court obtained jurisdiction of the action from the time of granting the attachment (*Code*, *sec.* 416); that the summons, therefore, was amendable (*sec.* 723); and that an order amending

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it *nunc pro tunc* was properly granted. (*Gribbon* agt. *Freel*, 93 *N. Y.*, 93.)

ANSWER.

1. Where an order of arrest is procured and executed more than twenty days after the service of the summons and complaint, the defendant has, by section 566 of the Code of Civil Procedure, twenty days after such arrest, to serve an answer. (*Clady* agt. *Wood*, *ante*, 1.)

2. The action was brought to recover for professional services rendered by the plaintiffs, as attorneys and counsel, in conducting certain actions and proceedings instituted by the defendant to obtain the possession of the office of mayor of the city of Albany, and which services were charged in the complaint to have been rendered upon the retainer and request of the defendant. The answer failed to take issue squarely upon this allegation, but sought to evade it by alleging that the service was not performed for the defendant any more than for any other citizen of Albany:

Held, that the answer might be literally true, and yet there is no defense stated because the retainer and employment by the defendant to perform the services is undenied and for this reason the answer is frivolous and the plaintiff is entitled to judgment on account of the frivolousness of the answer, unless the defendant serves an amended answer within ten days and pays ten dollars costs of motion. (*Hale* agt. *Swinburne*, *ante*, 387.)

3. On a motion by defendant for a stay of proceedings pending an appeal to the general term from this order:

Held, that the motion should be denied unless the defendant gives security for the payment of the recovery in the action, if he fails

upon his appeal from the order. (*Id.*)

See AMENDMENT.

Rider agt. *Bates*, *ante*, 129.

APPEAL.

1. It is not in every case where the defendant demands in his answer judgment in his favor exceeding fifty dollars that he, as appellant, may demand and have a new trial in the appellate court, but only in those cases where from the nature of the action and the condition of the pleading it can be seen that the demand has some basis in fact or law in its support. (*Harvey* agt. *Van Dyke*, *ante*, 396.)

2. An improper pleading cannot be made the basis of a demand for a new trial in the county court, under the Code, applicable to appeals from judgments rendered by justices of the peace. (*Id.*)

3. Where an action was brought in a justice's court in trover for taking and converting a cow, and damages were claimed in the sum of fifty dollars, the defendant answered by general denial, also set up property in himself, demanded judgment for the dismissal of the complaint and for seventy-five dollars damages, &c. Judgment was rendered in favor of plaintiffs for forty-four dollars and twelve cents. The defendant in his notice of appeal to the county court demanded a new trial in that court. The justice's return having been filed the plaintiffs moved thereon for an order transferring the case to the law calendar, and that it be heard on the justice's return without a new trial therein, which motion was denied:

Held, that the practice was correct. It was proper to determine in advance whether the appeal was to be tried on a question of fact or

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- one of law. The county court had jurisdiction to determine that question, and it could do it as well on special motion as at opening of trial. (*Id.*)
4. Where no motion is made for a new trial, and no appeal is taken from the order denying the same, the only questions coming up for review are those presented by the exceptions taken upon the trial. (*Schmidt* agt. *Couperthwait*, ante, 477.)
 5. In an action brought by an attorney for services, the complaint contained a single count alleging such services generally, and the bill of particulars furnished by plaintiff specified numerous items extending through a period of four years; the answer admitted generally that the plaintiff performed services for defendant "during the term and as stated in the complaint," but with that exception denied the complaint and alleged payment, and that the services were performed negligently. The plaintiff having moved for a reference, the defendant admitted that the items of plaintiff's bill of particulars were correctly stated as to their number and date and character of service, but not as to their value:
Held, also, that the action was one which the county court had power to refer in its discretion, and the order being discretionary the supreme court cannot review it on appeal. (*Stebbins* agt. *Cowles*, ante, 28.)
 6. The decision of one tribunal resting in discretion are not reviewable by another. This rule does not apply to a review by the general term of this court of the decisions of the special term, they being parts of the same court. But the county court being an independent tribunal, this court cannot interfere with the exercise of its discretionary powers. (*Id.*)
 7. It is a settled rule of practice that if a party proceeds under an order, or accepts any benefit thereunder, it is a waiver on his part of the right of appeal; and if after taking an appeal he proceeds under the order appealed from, or accepts any benefit thereunder, he in like manner waives his appeal. (*Grunberg* agt. *Blumentahl*, ante, 62.)
 8. Where the defendant obtains a verdict and the trial judge awards a new trial upon his minutes, the defendant by entering upon the new trial and accepting the chances of succeeding thereat waives his right to appeal from the order. (*Id.*)
 9. The remedy of the defendant in such a case was to have procured a stay of proceedings pending an appeal from the order in question. (*Id.*)
 10. Under the Code of Civil Procedure, as under the former Code, a decision of the court overruling or sustaining a demurrer, is an order and not an interlocutory judgment, from which no appeal lies. (*Thompson* agt. *Schieffelin*, ante, 235.)
 11. Where a person signs an undertaking given on appeal in an action as surety, with the express understanding that it was to be executed also by another surety, and the law requires two sureties to an undertaking that would operate as a stay, such surety is not liable on the undertaking if it be filed without a second surety being obtained. (*Grimwood* agt. *Wilson*, ante, 283.)
 12. Formerly the people had no right or power to review a decision or judgment favorable to a prisoner. The right to do so depends upon statute. Under section 518 of the Code of Criminal Procedure an appeal to the supreme court can

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- be taken by the people in two cases only: 1st. From a judgment for the prisoner on a demurrer to the indictment. 2d. From an order of the court arresting judgment. (*The People* agt. *Dempsey*, ante, 371.)
13. An order of the oyer and terminer setting aside a grand jury and quashing an indictment is not reviewable in the supreme court. (*Id.*)
 14. The general term of the supreme court can correct errors and mistakes in criminal cases only when brought before it pursuant to statute. (*Id.*)
 15. Whether or not the supreme court will, in the first instance, order the fees of a referee, appointed to take proofs and report as to the claims of a receiver of an insolvent life insurance company, for compensation and expenses, to be paid directly out of the fund is a matter of discretion, and its determination is not reviewable here. (*Att'y-Gen'l* agt. *Cont'l L. Ins. Co.*, 93 N. Y., 45.)
 16. An order of a surrogate denying the application of one having no direct or contingent interest in the fund, to intervene in proceedings to compel an executor to pay over a legacy, is in his discretion; it involves no substantial right, and so is not reviewable here. (*In re Halsey*, 93 N. Y., 48.)
 17. So, also, as to an order of the supreme court refusing to stay such proceedings, pending proceedings *de lunatico inquirendo* against the legatee. (*Id.*)
 18. A surrogate has the right to determine the form of his own order, and his order denying an application for a resettlement of a prior order is not reviewable here. (*Id.*)
 19. A surrogate's order requiring an executor to account, and directing a reference to ascertain his place of residence and whether he has an office in the state is preliminary and not final, and so not reviewable here. (*Id.*)
 20. The complaint herein set up a contract for the purchase by defendant, the W. U. T. Co. of the lines of the two other telegraph companies; it alleged that the property purchased was much less in value than the amount of stock issued in payment therefor. The directors of the W. U. T. Co. were made parties defendant, and judgment was asked against them individually for the amount the stock payment exceeded the value of the property, and for the amount of the stock dividend in case it had been issued and distributed. The corporation alone appealed from an order of the general term, which reversed a judgment in favor of defendants and granted a new trial, giving the prescribed stipulation (*Code*, sec. 191, subd. 1) for judgment absolute in case of affirmance: *Held*, that the appeal was proper. (*Williams* agt. *West. Un. Tel. Co.*, 93 N. Y., 162.)
 21. Where a judgment in favor of defendants, whose liability as alleged in the complaint is several, not joint, and who answer separately, is reversed on appeal to the general term, one of the defendants may alone appeal to this court. (*Id.*)
 22. As to whether this is so, where the defendants are jointly interested in the defense, *quære*. (*Id.*)
 23. An application to set aside a sale made in pursuance of a judgment, in an equitable action, is addressed to the discretion of the court, and an order denying the application, where an abuse of this discretion is not shown, is not reviewable here. (*Winter* agt. *Eckert*, 93 N. Y., 367.)
 24. Where, after the denial of a mo-

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tion to vacate an order of arrest, the defendant renews the motion upon further affidavits, this is a waiver of the right to appeal from the order denying the first motion. (*Harris* agt. *Brown*, 93 N. Y., 390.)

25. After a referee had made his report in favor of plaintiff, the latter, as a consideration of its delivery, executed an agreement giving to the former a first lien, for his fees, "upon the judgment and claim of the plaintiff," the same to be paid "out of the first moneys collected * * * upon said judgment or any subsequent judgment that may be recovered." Both plaintiff and the referee knew at the time that defendant intended to appeal: *Held*, that the referee was disqualified from settling the case; the plaintiff having, by his own act, thus created the disqualification, and amendments having been served to the case as proposed, he was not entitled, as of course, to the benefit of the provisions of the Code of Civil Procedure (*sec.* 997) which, in case of disability of a referee, permits the court to prescribe the manner of settling the case; but that an order setting aside the report and judgment entered thereon was in the discretion of the court and so was not reviewable here. (*Leonard* agt. *Mulry*, 93 N. Y., 392.)

26. Upon argument here, plaintiff's counsel presented an offer to withdraw the proposed amendments: *Held*, that, as it was not in the appeal papers and did not appear to have been presented to the court below, it could not be considered here. (*Id.*)

27. An order directing a bill of particulars is not reviewable here, unless it clearly transcends the power of the court granting it, as defined by the general course of practice in regard thereto. (*Witkowski* agt. *Paramore*, 93 N. Y., 467.)

28. Error in receiving evidence objected to, which is entirely imma-

terial and which could not have prejudiced the party objecting, is not a ground of reversal. (*Tenney* agt. *Berger*, 93 N. Y., 524.)

29. A stipulation must be so clear as to leave no doubt of the intention of the party to cut off his right to appeal before it will be so construed. (*Stedeker* agt. *Barnard*, 93 N. Y., 589.)

30. An order for judgment having been granted herein, on motion to set aside defendant's answer as improperly verified, sham and frivolous, defendant moved to open default and for leave to serve amended answer, which was granted, but the order was reversed, on appeal by the general term. On appeal to this court from order of general term, defendant gave an undertaking to the effect that if said order was affirmed or appeal dismissed, he would pay any judgment entered upon the original order. The order appealed from was affirmed and judgment entered: *Held*, that defendant was not estopped by the undertaking from appealing from the judgment; that the clause referred to was satisfied by holding it to relate to the final judgment in the action. (*Id.*)

31. Where an attempt had been made to levy upon shares of the stock of a foreign corporation, owned by a non-resident defendant, by leaving a certified copy of attachment and notice prescribed by said Code (*sec.* 649), with the secretary of the corporation in this state: *Held*, that defendant was entitled to move to have the levy set aside and vacated; and that an order refusing this relief was reviewable here. (*Plimpton* agt. *Bigelow*, 93 N. Y., 592.)

32. Where a money judgment is reversed *in toto* by the general term, under the stipulation required on appeal to this court, if the order of reversal is affirmed, judgment

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absolute against appellant must be directed, although the evidence would have justified a judgment for a less amount than that rendered. (*Gray* agt. *Bd. Sup'rs Tompk. Co.*, 93 *N. Y.*, 603.)

33. To authorize a review here of an order vacating an attachment, it must appear in the order itself that it was not vacated in the exercise of the discretion vested in the court below. The opinion of that court may not be looked at to ascertain the grounds of the decision. (*Brooks* agt. *Mex. Nat. Con. Co.*, 93 *N. Y.*, 647.)

34. An appeal may be taken to the general term from an interlocutory judgment (*Code of Civil Procedure*, sec. 1349), but such a judgment can only be reviewed in this court on appeal from the final judgment (*Secs.* 190, 1336, 1350). (*Victory* agt. *Blood*, 93 *N. Y.*, 650.)

35. The defendant sold and transferred to the plaintiff four promissory notes and certain other securities pledged to insure the payment thereof. At the time of the sale the defendant verbally promised and agreed that the said notes were valid and subsisting obligations against the makers, indorsers and guarantors thereof, and that none of them had been discharged from their liability thereon. These representations having proved to be untrue the plaintiff brought this action to recover the damages he had sustained. The referee directed a judgment for the amount of the notes and the costs of an unsuccessful action brought against one of the indorsers, but neglected to credit the defendant with the amount which it appeared the plaintiff had realized from the collateral securities held by him. The defendant excepted "to the direction for the entry of judgment in favor of the plaintiff," but did not specifically except to the failure of the referee to require the plaintiff to apply

the amount received for the collaterals in payment of the notes, nor did he specifically request the referee to require him so to do: *Held*, that the general term is not prevented, by the failure of the party aggrieved to specifically except thereto, from correcting any error or mistake which may have been committed by a referee. (*Mandeville* agt. *Marrin*, 30 *Hun*, 282.)

36. That in this case the error was so grievous to the defendant and the injustice which would be done, if the judgment were allowed to stand, was so great, that the judgment should be reversed, although no specific exceptions to the error committed by the referee had been taken. (*Id.*)

37. No appeal lies to the general term from an *ex parte* order made at special term, vacating and setting aside an order theretofore made. The proper remedy is to move at special term, on notice and the proper papers, to set aside the *ex parte* order objected to, and if such motion is denied then to appeal from such order of denial. (*People ex rel. Schlehr* agt. *Common Council*, 30 *Hun*, 636.)

38. For a failure to comply with Rule 34, requiring the facts of the case, together with the rulings on the trial, to be stated in a narrative form, and providing that the evidence shall not be set forth *in hæc verba*, or by question and answer, unless so ordered by the justice, surrogate or referee by or before whom the case is settled, the case will be sent back for resettlement. (*Smith* agt. *N. Y. C. and H. R. R. Co.*, 30 *Hun*, 144.)

39. The provisions of chapter 16 of the Code of Civil Procedure, in reference to appeals, do not apply to an appeal in a proceeding by *certiorari* commenced prior to September 1, 1880 (*Code*, sec. 3347,

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- subd. 11). (People ex rel. Murphy agt. French, 92 N. Y., 306.)*
40. *It seems* the provision of said chapter (*sec. 2140*), declaring that in such a proceeding the court, upon "*the hearing*," shall have power to determine whether there was such a preponderance of proof against the existence of any fact found, that the verdict of a jury affirming its existence rendered in an action in the supreme court, "would be set aside as against the weight of evidence," has no application to appeals to this court. It only applies to the "*hearing*" on return to the writ, and is confined to the court in which such hearing is had. (*Id.*)
41. *It seems*, also, that the general statutory scheme for the distribution of judicial powers does not contemplate the review by this court of disputed questions of fact, and it will not entertain such questions in the absence of express legislative authority. (*Id.*)
42. Where an order of special term recited that it was made "on reading and filing the decision of the court," referring to an opinion which was the only decision filed, and the minutes of the general term on affirmance of such order stated that it was affirmed on opinion of the judge at special term: *Held*, that the opinion was thus made part of the record and could be referred to to ascertain the grounds of the decision; and, it appearing therefrom that the decision was based upon the ground of a want of power: *Held*, that the order, although a discretionary one, was reviewable here. (*Talman agt. Syr. & B. R. R. Co., 92 N. Y., 353.*)
43. Within the limitations fixed by the provisions of the Code of Civil Procedure (*sec. 3253*) in reference to extra allowances for costs, the power of the court below to make allowances is not subject to review here; but the question whether an allowance exceeds those limitations is one of law, proper to be considered by this court. (*Conaughty agt. Saratoga Co. Bank, 92 N. Y., 401.*)
44. In an action brought to restrain a corporation from the exercise of its corporate franchises: *Held*, that the subject-matter involved was simply the corporate franchises, not its capital and moneyed assets, that in the absence of any evidence as to the money value of those franchises, an extra allowance was improper, and that an order allowing it was reviewable here. (*Id.*)
45. The provision of the Code of Civil Procedure (*sec. 3301, as amended by chap. 399, Laws of 1882*), providing that the stipulation of the attorneys for parties to an action may take the place of a clerk's certificate to a copy of a paper whereof a certified copy is required, was not intended to alter the effect of the provision (*sec. 1315*) requiring a return to this court to be certified by the clerk of the court from which the appeal is taken, or of the rule of this court (*Rule 1*) making the same requirement. (*Dow agt. Durragh, 92 N. Y., 537.*)
46. Returns to this court should be made by a responsible officer, under sanction of his official oath, and attorneys for parties cannot, by stipulation, make up a case for the court. (*Id.*)
47. In the absence of exceptions on a criminal trial this court has no power to review the case upon the facts. (*People agt. Hovey, 92 N. Y., 554.*)
48. The provision of the Code of Criminal Procedure (*sec. 527*), as amended in 1882 (*chap. 360, Laws of 1882*), providing that "the appellate court may order a new trial if it be satisfied that the ver-

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- dict against the prisoner was against the weight of evidence or against law, or that justice required a new trial, whether any exceptions shall have been taken or not," applies only to appeals to the supreme court. (*Id.*)
49. An exception to a charge taken after a criminal trial has terminated, does not present any question for the consideration of an appellate court. (*Id.*)
50. Where, therefore, after a criminal trial, and when the prisoner was before the court for sentence, his counsel moved for a new trial for an alleged error in the charge, and upon denial of the motion took an exception: *Held*, that no question was thereby presented here for review. (*Id.*)
51. The provision of the Code of Criminal Procedure (*sec.* 527) providing that "the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence, * * * or that justice requires," is applicable only to the supreme court and gives that court a discretionary power. When in the exercise of that discretion it refuses or grants a new trial its determination is not reviewable here. (*People* agt. *Boas*, 92 *N. Y.*, 560.)
52. Under the provision of said Code (*sec.* 519), authorizing an appeal to this court by the people, from a judgment of the general term reversing a judgment of conviction, such an appeal brings up for review only questions of law. (*Id.*)
53. In determining whether the reversal was solely upon questions of law, the record only can be examined; the opinion of the general term forms no part thereof and may not be looked at. (*Id.*)
54. Unless, therefore, the order of the general term shows that the supreme court has exercised its discretion and refused a new trial upon the facts and granted it only for errors of law, there is nothing for this court to review on appeal to it. (*Id.*)
55. An action may be brought under the Code of Civil Procedure (*sec.* 1937), after the recovery of a judgment against joint debtors, by the judgment creditor "against one or more of the defendants who were not summoned in the original action," although the defendants served have appealed and have given the security, which under said Code (*sec.* 1310) "stays all proceedings to enforce the judgment appealed from. (*Morey* agt. *Tracey*, 92 *N. Y.*, 581.)
56. The determination of the trial judge of the fact as to the loss of a paper, secondary evidence of the contents of which is sought to be given, cannot be reviewed here, unless the proof of loss was so clear and conclusive that it was error of law to find against it. (*Kearney* agt. *Mayor, etc.*, 92 *N. Y.*, 617.)
57. The complaint herein set forth a demand for \$398.71; the answer denied liability and set up a counter-claim for \$301.29. The trial court found with defendant and gave judgment against plaintiff for the counter-claim. The general term reversed the judgment: *Held*, that the amount of the two claims constituted "the matter in controversy," within the meaning of the Code of Civil Procedure (*sec.* 191, *subd.* 3), and that this court had jurisdiction on appeal. (*Crawford* agt. *West Side B'k*, 92 *N. Y.*, 631.)

APPEARANCE.

1. An order extending time to answer is equivalent to a notice of appearance. (*Krause* agt. *Averill, ante*, 97.)

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ARBITRATION.

1. The mere submission of a cause to arbitration, the arbitrators never taking or consenting to take upon themselves the burden of the submission, operates as a discontinuance of a suit pending in court between the parties. (*McNulty* agt. *Solley*, ante, 147.)
2. Where, after a case has been closed, one of three arbitrators produces and exhibits to the others, in the absence of the parties, written testimony signed by a competent witness, which relates to one of the controverted issues, the award should be set aside if it could by any possibility have been affected by the evidence so received. The fact that the strong preponderance of the testimony seems to show that the new evidence was not received or considered by the arbitrators in making their award will not be sufficient to sustain it. (*Nat. Bank of the Republic* agt. *Darragh*, 30 *Hun*, 29.)
3. A motion to vacate an award for the wrongful and improper behavior of the arbitrators may be made upon an affidavit of one of the arbitrators, who refused to sign the award because he considered the conduct of the other arbitrators to be illegal and unfair. (*Id.*)

ARREST.

1. Where an order of arrest is procured and executed more than twenty days after the service of the summons and complaint, the defendant has, by section 566 of the Code of Civil Procedure, twenty days after such arrest to serve an answer. (*Clady* agt. *Wood*, ante, 1.)
2. Where the cause of action is identical with the ground of arrest the court will not vacate the order of arrest on conflicting affidavits. (*Miller* agt. *Parks et al.*, ante, 159.)

3. Where the facts disclosed by the affidavits on both sides do not make a clear preponderance of evidence to show that the plaintiff cannot succeed in his action an order of arrest will not be vacated. (*Id.*)
4. Although a motion may be made to vacate an order of arrest on the ground that the affidavits on which the order was granted did not state, as required by Rule 25, whether any previous application had been made for such order, such motion should be made with diligence. (*Schachne et al.* agt. *Kayser*, ante, 395.)
5. It is not intended in reserving the right of the party arrested to move to vacate the order at any time before final judgment, to include the right to so move for a failure to comply with Rule 25. (*Id.*)
6. It is too late to make such motion after the action is ready for trial. (*Id.*)
7. Subdivision 3 of section 549 of the Code of Civil Procedure, authorizing the granting of an order of arrest in an action brought to recover money, funds, credits or property, held or owned by the state, or for or on behalf of a public or governmental interest, * * * which the defendant has without right obtained, received, converted or disposed of, does not authorize such an order to be granted in an action brought by the people to recover property which is alleged to have been forfeited to the state by reason of the defendant's having offered the same for sale or distribution, in violation of the provisions of the Penal Code against lotteries. (*People* agt. *Phillips*, 30 *Hun*, 553.)
8. The fact that one member of a firm, with knowledge of its insolvency, has paid certain of his individual debts out of the firm moneys with the intent to give

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- them a preference over the firm debts, is not sufficient to establish such a guilty intent to dispose of his property for the purpose of defrauding his creditors as is required to justify his arrest under the provisions of the Code of Civil Procedure. (*Sherrill Roper Air Engine Co. agt. Harwood*, 30 Hun, 9.)
9. Where a sheriff has been discharged from liability under an order of arrest by the justification and allowance of bail as prescribed by the Code of Civil Procedure (secs. 580, 581), the court has no power to renew his liability. (*Lewis agt. Stevens*, 93 N. Y., 57.)
 10. Where, after the denial of a motion to vacate an order of arrest, the defendant renews the motion upon further affidavits, this is a waiver of the right to appeal from the order denying the first motion. (*Harris agt. Brown*, 93 N. Y., 390.)
 11. *It seems*, the fact that no formal leave to renew a motion on additional papers was granted does not necessarily determine that a second motion made on an order to show cause is not a renewal; the granting the order to show cause, and hearing the second motion on the original and additional papers is, in effect, granting leave to renew, and a renewal. (*Id.*)
- ure, they are officers *de facto* and competent to lay an assessment. (*Dows agt. Village of Irvington*, ante, 93.)
2. Irregularities in an election which would not change the result will not be rectified in the courts. If an election is irregular, *certiorari* is the proper remedy. (*Id.*)
 3. The defects that the assessment-roll was made by officers who had not qualified, and contained names not properly on it, and omitted others which ought to have been on, cannot be inquired into collaterally. (*Id.*)

ASSIGNEE.

1. On October thirty-first, the assignee drew out of the moneys of the estate deposited in the Central National Bank \$8,000, and on November fifth he drew the further sum of \$7,000. Both these drafts were entered on the cash book of the assignee on the last mentioned day. On November ninth, one of the attorneys for the parties making this motion for the removal of the assignee, saw these entries and asked to see the assignee's check book. The assignee refused to show the check book, and said that his official check book was his private affair. His attention being called to the fact that these entries had challenged inquiry, he thought it best, for some reason that does not appear, to cause the word "special deposit" to be added to the entries:
Held, first, that the assignee's refusal to show the check book was improper and contrary to the rules of this court.
Second. He erred in saying that his official check book was his private affair. When an assignee voluntarily assumes the position of a trustee for others, his action respecting property in which they are interested, is in no sense his private affair.

ASSESSMENT.

1. The fact that the president and trustees of the village of Irvington failed to take the prescribed oath of office before entering upon the performance of their duties as such trustees and president, does not affect the validity of their action in organizing themselves into a board of water commissioners under the act of 1875, chapter 181, to furnish water to said village; they having taken possession of their offices and the public having acquiesced in their claim and ten-

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Third. An assignee, without criminal intent, may, from pure good nature, lend to a necessitous friend, without security, the money of the assigned estate; but if he does so he violates his duty and becomes liable to removal. The law will not tolerate any action, however benevolent may be the motive that prompted it, which turns the trust fund from the use to which the creation of the trust directed its application.

Fourth. The conduct of the assignee, in concealing from the creditors the purpose for which the money was drawn, and in withholding from the court evidence that he undoubtedly possesses, as to the times at which he deposited the money, though he promised to produce the evidence, amounts to misconduct within the meaning of the assignment act, and calls for his removal. (*Matter of Mayer & Co., ante, 106.*)

2. Where an assignee has violated no duty, but was removed because his domestic relations were such as to make it probable that his feelings might conflict with his duty, his commissions will be allowed. (*Matter of Schlang, ante, 199.*)
3. The assignee's claim for rent, clerk hire and gas bills paid whilst the stock was selling at retail was properly disallowed. But it was proper to allow such expenses as were incurred in preparing the goods for sale at auction. (*Id.*)
4. It is the duty of the assignee to defend the trust, and to preserve the assigned estate, and it is proper to allow him the amount payable to his counsel for services in a replevin suit. (*Id.*)
5. Where difficult questions arise an assignee may lawfully employ counsel to advise him in relation to the administration of the estate, and charge the expenses to the trust fund. (*Id.*)

6. If a trustee or assignee has good ground for retiring, the costs of the suit by which he seeks and obtains a discharge from his trusteeship will be paid out of the trust fund. (*Id.*)

7. Where, as in this case, an assignee without any fault on his part, is called upon to vacate his office, he stands in the position of one who voluntarily and for good cause seeks to be relieved from his trusteeship. With respect to the expenses of his accounting, he should be treated like a trustee, who, for good reason, and of his own accord, asks leave to lay down his office. (*Id.*)

8. The assignee should not be allowed a payment made of a gas bill which was contracted for by the assignors and was a claim against the assigned estate. Not being a preferred claim, only a *pro rata* portion should have been paid. He should on the final accounting of the substituted assignee be entitled to reclaim the amount which, on a *pro rata* payment to creditors of the non-preferred class would be coming to the gas company. (*Id.*)

9. The costs to be allowed on an accounting of an assignee are such costs as would be awarded on the trial of an issue of fact in a civil action; that is to say, for proceedings after notice and before trial, and the usual trial fee. (*Id.*)

ASSIGNMENT.

1. Unless an assignment for the benefit of creditors is void upon its face, or the extrinsic facts which go to show its invalidity are most clearly made out, its legality is to be assumed; and a clear case voiding the assignment should be made out to justify the granting of an injunction against the assignee restraining him from

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executing the trust created by it. (*Minzesheimer* agt. *Mayer*, ante, 484.)

ATTACHMENT.

1. Although there is no positive proof of the removal or concealment of property with intent to defraud creditors, yet circumstances sufficient to establish in law such intent would justify its being upheld. (*Kipling et al.* agt. *Corbin*, ante, 12.)
2. That defendant threatened to make an assignment with preferences, unless used in a coercive manner, furnishes no ground for an attachment. (*Id.*)
3. Where the papers upon which an attachment was issued showed that the defendant was indebted to the plaintiff for goods sold and delivered, that defendant was insolvent and made an exhibit of his liabilities and assets to plaintiff. The cash on hand and book debts were set forth in a memorandum, but not the value of the stock; but such value was discussed, and the amount they would bring at a final sale was a subject of conversation. It appeared that the articles manufactured were nearly all in an unfinished state and not readily marketable; and the plaintiff was cognizant of all these facts, and knew the goods on hand and was a good judge of their value:
Held, that what this value of the stock was, was a subject of fair conjecture and it cannot be held that there was any such concealment as to warrant the maintenance of an attachment. (*Id.*)
4. Section 647 of the Code of Civil Procedure, authorizing the attachment of shares of the defendant in a corporation, does not apply to shares of stock in a foreign corporation. (*Plympton* agt. *Bigelow*, ante, 131.)
5. The shares of a non-resident defendant in the stock of a foreign corporation cannot be deemed to be within this state, by reason of the fact that the president and other officers of the corporation are here engaged in carrying on a corporate business. (*Id.*)
6. Upon the application of the plaintiff, an attachment was issued against the defendants upon an affidavit which stated that "the defendants are justly and truly indebted unto this plaintiff in the sum of \$20,000 lawful money of the United States, over and above all counter-claims known to this plaintiff, for damages, for the breach of a contract, express or implied, other than a contract to marry, founded upon the following facts, to wit: For work, labor and services done and performed, and caused to be done and performed, by the plaintiff to and for said defendants, and at the special instance and request of the defendants, in consideration that the defendants had agreed and undertaken to pay to plaintiff therefor whatever said work, labor and services were reasonably worth, and which work, labor and services consisted in the examination, location and reporting on mines and mining property located in Arizona, and in which the defendants claim to have an interest, and in obtaining for the defendants lands, vesting in them a lawful title and interest in certain mines and mining property in Arizona, and in work for them in his (plaintiff) profession as a mining engineer; that said work, labor and services were reasonably worth the sum of \$20,000; that no part thereof has been paid, but that the sum of \$20,000 is justly due and owing from the defendants to the plaintiff over and above all counter-claims known to him. Said work, labor and services were performed during a period from September 1, 1882, in Arizona, to the time of the com-

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mencement of this action." The affidavit then sets out the defendant Sisson resides in California and the defendant Safely in Indiana:

Held, that the affidavit fails to show that there has been a breach of the alleged contract between the plaintiff and the defendants, and the attachment should be vacated. (*Smadbeck* agt. *Sisson*, ante, 221.)

7. Upon the application of the plaintiff an attachment was issued against the property of the defendant upon an affidavit made by the plaintiff, in which it was alleged that defendant was indebted to him in the sum of \$6,000, over and above all counter-claims, for damages for a breach of a contract, express or implied, and that such indebtedness arises upon the following facts: That at sundry times since April 1, 1883, up to and including this date, November 5, 1883 (upon which day the attachment was granted), the plaintiff, at the special instance and request of the defendant, loaned and advanced to him sums of money, amounting in all to the sum of \$6,000, which he promised and agreed to repay, but no part of which has been repaid:

Held, that the affidavit was insufficient; that if the affidavit is true a portion of the loan was made the day the attachment was issued, and therefore no proof of contract was shown and the attachment should be vacated. (*Reilly* agt. *Sisson*, ante, 224.)

8. In an affidavit for an attachment in a suit to recover for work, labor and services, upon the ground of the non-residence of defendant, it appeared that on the very day the services were completed the action was begun:

Held, that the action was prematurely commenced as the defendants were entitled to the whole of the day in which the services were completed to pay

for their performance. There should also have been proof of notification to defendant that the services were completed, and of demand made and refusal to pay (*Affirming S. C.*, ante, 220.) (*Smadbeck* agt. *Sisson*, ante, 225.)

9. An affidavit on which an attachment was granted, which alleged that the defendant was indebted to him in a certain sum, over and above all counter-claims, for damages for a breach of a contract, express or implied. That the facts upon which such indebtedness arises are that at sundry times since April 1, 1883, up to and including November 5, 1883, which is the day the attachment was granted, the plaintiff, at the special instance and request of the defendant, loaned and advanced to him sums of money, amounting in all to the sum of \$6,000, which he promised and agreed to repay, but no part of which has been repaid:

Held, that the affidavit was insufficient; that no breach of the alleged contract was shown and the attachment should be vacated (*Affirming S. C.*, ante, 224.) (*Reilly* agt. *Sisson*, ante, 228.)

10. In an affidavit on an application for an attachment the *cause of action* was stated on *information and belief*, but the *non-residence* of the defendants was alleged *positively*. On motion to vacate the attachment:

Held, that the cause of action being stated on information and belief, and the sources of the information not being given, the attachment must be vacated. Such a verification is proper in a pleading, but not in an affidavit to obtain an attachment. (*King* agt. *Southwick*, ante, 283.)

See SHERIFF'S FEES.

Hull agt. *United States Reflector Company*, ante, 31.

11. An attachment was issued upon

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an affidavit made by an agent of the plaintiff, who stated that he was personally acquainted with the facts and circumstances which he therein set forth. He then stated that the plaintiff was justly entitled to recover the sum named upon the various claims set forth "over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of *deponent*." Upon a motion by a subsequent attaching creditor to have the attachment vacated: *Held*, that the affidavit was defective in failing to state that the sum claimed was due over and above all claims and set-offs existing in favor of the defendant, "to the knowledge of the plaintiff," and that it was not sufficient to show that they did not exist to the knowledge of the plaintiff's agent. That the defect was a jurisdictional one, which was not waived by the failure of the defendant to object to it.

It seems, that when the action is brought to recover the amount due upon a promissory note, and also for merchandise sold at different times to the defendant, and upon claims assigned to the plaintiff, the affidavit should show that as to each of the items there is no counter-claim existing in favor of the defendant to the knowledge of the plaintiff, notwithstanding the fact that it is made by the plaintiff's agent or attorney in fact. (*Murray* agt. *Hankin*, 30 *Hun*, 37.)

12. An attachment was granted herein upon an affidavit made by one of the plaintiffs' attorneys, in which he stated that the amount named was due to the plaintiffs "over and above all counter-claims, discounts and set-offs known to the plaintiffs or the *deponent*." The affidavit stated that it was made by the attorney, because the plaintiffs resided out of the county, and that the *deponent's* knowledge as to the debt was derived from a statement of

the account upon which the action was founded, sent to him by his clients in a letter: *Held*, that the attachment was properly vacated upon the moving papers, as the affidavit did not show either that the attorney had any knowledge, or the source of his knowledge, that the amount named was due, over and above all counter-claims known to the plaintiffs. (*Cribben* agt. *Schillinger*, 30 *Hun*, 248.)

13. Under sections 682 and 683 of the Code of Civil Procedure a motion to vacate an attachment may be made after a judgment has been entered in the action and an execution has not been issued thereon, provided the attached property or the proceeds thereof, has not been actually applied to the payment of the judgment. (*Parsons* agt. *Sprague*, 30 *Hun*, 19.)
14. Pending a contest as to the validity of a will, a special administrator was appointed. A judgment had been recovered against the decedent prior to his death. An attachment against the judgment creditor was sought to be executed upon the judgment by service of copy upon the executrix named in the will. The special administrator was then acting, and the contest was then and is still pending: *Held*, that the executrix had no power to represent the estate, and so was not the "individual holding such property" within the meaning of the provision of the Code of Procedure (sec. 225), authorizing the execution of an attachment by service of a copy; that, therefore, the judgment was not reached by the attachment; and that an order of the surrogate denying an application of the attachment creditor for the payment of the same to him was proper. (*In re Flandrow*, 92 *N. Y.*, 256.)
15. Also, *held*, the fact that the attorney for the special administrator,

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- upon being inquired of, gave information that the person named in the will was executrix, but concealed the appointment of the special administrator, did not preclude the latter from raising the objection. (*Id.*)
16. To sustain an application under the Code of Civil Procedure (*sec.* 682) by one claiming a lien, as an attachment creditor, to vacate a prior attachment, it is necessary for him to establish, by legal evidence, a subsequent valid levy under his attachment upon the same property covered by the prior attachment. (*Tim* agt. *Smith*, 93 *N. Y.*, 87.)
17. The opinion of his attorney that the subsequent lien has been secured, although put in the form of an affidavit, is not sufficient. (*Id.*)
18. Under the provisions of the Code of Civil Procedure (*sec.* 638), requiring the service of the summons, in an action wherein an attachment has been granted, "within thirty days after the granting thereof," when the thirtieth day comes on Sunday it must be excluded, and a service upon the next day meets the requirement (*Sec.* 788). (*Gribbon* agt. *Freel*, 93 *N. Y.*, 93.)
19. Where a summons issued out of the marine court of the city of New York, in an action wherein an attachment and order directing service by publication was granted, stated the time within which defendant was required to answer at six days, instead of ten, as required by the Code of Civil Procedure (*sec.* 3165, *subd.* 2): *Held*, that the defect was not a jurisdictional one but an irregularity merely; that the court obtained jurisdiction of the action from the time of granting the attachment (*Code*, *sec.* 416); that the summons, therefore, was amendable (*sec.* 723); and that an order amending it *nunc pro tunc* was properly granted. (*Id.*)
20. An attachment issued against a national bank, which is at the time insolvent, is invalid (*U. S. R. S.*, *sec.* 5242), and is not made valid by the subsequent acquisition by the bank of further capital. (*Raynor* agt. *Pac. Nat. Bk.*, 93 *N. Y.*, 371.)
21. The fact that the bank after the issuing of the attachment paid a large amount of its debts in full does not estop it from questioning the validity of the attachment. (*Id.*)
22. The provision of the National Banking Act prohibiting attachments in such cases is not repealed by the act of Congress of July 12, 1883, providing that the jurisdiction for suits thereafter brought against national banks shall be the same as for suits against state banks, and repealing laws inconsistent therewith. (*Id.*)
23. Shares owned by a non-resident defendant in the stock of a foreign corporation cannot be reached and levied upon by virtue of an attachment, although officers of the corporation are within the state, engaged in carrying on the corporate business here. (*Plimpton* agt. *Bigelow*, 93 *N. Y.*, 592.)
24. The provision of the Code of Civil Procedure (*sec.* 647), declaring that shares of corporate stock owned by a defendant may be levied upon by virtue of an attachment, only applies to shares of stock of a domestic corporation. (*Id.*)
25. In order to make a valid or effectual seizure, under that process, in the case of intangible interests, as well as tangible property, the *res* must be within the jurisdiction. (*Id.*)
26. The stock of a corporation can only be regarded as being present, for the purpose of judicial pro-

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ceedings, at the place of residence of the owner, or of the corporation. (*Id.*)

27. A corporation has its domicile and residence only within the bounds of the sovereignty which created it; it is incapable of passing personally beyond that jurisdiction, and so it may not be deemed present in a state other than that of its origin, although its officers are present and it transacts its business in that state. (*Id.*)

28. The condition, therefore, that the *res* must be within the jurisdiction in order to an effectual seizure is not answered in respect to shares in a foreign corporation by the presence here of its officers, or the fact that it has property and is transacting business here. (*Id.*)

29. Where an attempt had been made to levy upon such shares, owned by a non-resident defendant, by leaving a certified copy of attachment and notice prescribed by said Code (*sec.* 649), with the secretary of the corporation in this state: *Held*, that defendant was entitled to move to have the levy set aside and vacated; and that an order refusing this relief was reviewable here. (*Id.*)

30. To authorize a review here of an order vacating an attachment, it must appear in the order itself that it was not vacated in the exercise of the discretion vested in the court below. The opinion of that court may not be looked at to ascertain the grounds of the decision. (*Brooks* agt. *Mex. Nat. Con. Co.*, 93 *N. Y.*, 647.)

ATTORNEY AND CLIENT.

1. In an action of ejectment brought to recover the possession of land and damages for the withholding thereof, the defendant pleaded a "counter-claim to the damages

demand," consisting of taxes paid and improvements and repairs made to the premises, the amount of which he sought to set off in extinguishment or reduction of the plaintiff's claim for damages: *Held*, that as this claim did not constitute a cause of action, but could only be applied to reduce the damages which the plaintiff might recover (*Code of Civil Procedure, sec.* 1531), it did not constitute a "counter-claim" within the meaning of that term, as used in section 66 of the said Code, giving the attorney of the defendant a lien thereon, and preventing the parties from settling the action without his consent. (*Pierson* agt. *Safford*, 30 *Hun*, 521.)

2. An attorney cannot refuse to go on with an action or proceeding because his client does not supply him with money, or by reason of any other difficulty, without running the risk of losing the benefit of the relation of attorney. (*In re H—*, an *Att'y*, 93 *N. Y.*, 381.)

3. In case of such refusal it is within the power of the court to permit the substitution of a new attorney, and it is within its discretion to determine upon what terms it shall be done, and, among others, whether the judgment or order when obtained shall be chargeable with the fees of the original attorney. (*Id.*)

4. In proceedings to wind up the affairs of an insolvent life insurance company M. was retained as attorney for certain policyholders, and appeared on their behalf. A dividend to each of the clients of M. was declared; he, claiming a lien thereon for his services, moved that the receiver be required to pay such dividends to him. It did not appear that the appearance of M. was entered on the record, or that his clients were in any way made formal parties to the proceedings as prescribed by

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the Code of Civil Procedure (*sec.* 1807), or that his services procured the dividends. The motion was denied unless M. should file with the receiver an authority to receive such dividends signed by his clients: *Held*, no error; that if M. had a lien (as to which *quære*), it was not proper for the court to make an order practically enforcing it, without notice to or a hearing of his clients. (*Att'y-Gen. agt. N. Am. L. Ins. Co.*, 93 N. Y., 387.)

5. *It seems*, that if the lien of M., if any, is not in gross on all the dividends for all his services, but a separate lien on each dividend for services rendered to the one entitled thereto. (*Id.*)

6. An attorney, retained generally to conduct a legal proceeding, enters into an entire contract to conduct the proceeding to its termination, and if, before such termination, he abandon the service of his client without justifiable cause and reasonable notice, he cannot recover for the services he has rendered. (*Tenney agt. Berger*, 93 N. Y., 524.)

7. The employment, however, by the client, without the consent of, or consultation with, the attorney, of a counsel with whom the attorney's relations are such that they cannot cordially co-operate, is a justifiable cause for his withdrawal from the case, and upon such withdrawal the client is liable for services rendered. (*Id.*)

ATTORNEY'S LIEN.

1. Where the attorney of a railroad company had a lien for his costs upon a judgment for the company, and the company, pending the action, became insolvent, the company's receiver has no title, legal or equitable, to such costs; and if the other party to the action, after notice of the attorney's lien, pay the judgment to the receiver, he

is not thereby protected from execution issued on such judgment. (*Matter of Bailey, ante*, 64.)

2. The lien of an attorney on a judgment recovered for the amount of his costs, &c., is well settled and has been regarded as an equitable assignment of the judgment to him. (*Naylor agt. Lane, ante*, 400.)

3. Where costs only are awarded to protect his rights he is not bound to give notice of lien. But where, as in this case, notice was given, no settlement of the litigations between the parties themselves by set-off or otherwise will be allowed which defeats the lien of the attorney. (*Id.*)

BAIL.

1. An indictment for contempt was found by the court of sessions of Albany county; an application for a writ of *habeas corpus* was made by the accused who was arrested in New York city, to a justice of the supreme court in New York. At the time of the hearing thereon the court of oyer and terminer in and for Albany county was in session: *Held*, that the oyer and terminer had authority to try the prisoner (2 R. S. 205, *secs.* 29, 30), and so that the justice had no authority to let the prisoner to bail. (2 R. S., 728, *secs.* 56, 57.) (*People ex rel. agt. Mead*, 92 N. Y., 415.)

2. Where a sheriff has been discharged from liability under an order of arrest by the justification and allowance of bail as prescribed by the Code of Civil Procedure (*secs.* 580, 581), the court has no power to renew his liability. (*Lewis agt. Stevens*, 93 N. Y., 57.)

3. Where, therefore, a notice of justification was duly served, and plaintiff not appearing, the bail was approved by default: *Held*, that the court had no power to open the default. (*Id.*)

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BAILMENT.

See CONTRACT.

Austin agt. *Seligman et al.*,
ante, 88.

BANKRUPTCY.

1. Where, after action was commenced, the plaintiff was adjudicated a bankrupt and an assignee of his property and estate was appointed:

Held, that the bankrupt had no legal right to maintain the action after the appointment of an assignee; and upon these facts being established the complaint should be dismissed. (*Dessau* agt. *Johnson*, *ante*, 4.)

2. The assignee is not absolutely bound to prosecute the action, but if he elects to proceed it must be in his own name and not in that of the bankrupt. (*Id.*)

BILL OF PARTICULARS.

1. In a suit to recover the proceeds of the sale of plaintiffs' goods by defendants, as agents, less their commissions, under a contract, the defendants set up a counter-claim for commissions upon other goods, under said agreement. The plaintiffs replied that the other goods sold were under contracts excepted from the agreement:

Held, that defendants are not entitled to a bill of particulars of such contracts, and of the goods furnished under them. (*John S. Way Manufacturing Co.* agt. *Corn et al.*, *ante*, 152.)

2. A party can only be required to state the particulars of his own cause of action or defense, and not the cause of action or defense of the adverse party. (*Id.*)

3. The power of the supreme court to order bills of particulars extends to all descriptions of actions, and it may be exercised as well in

behalf of the plaintiff as of the defendant. (*Clafin* agt. *Smith*, *ante*, 168.)

4. In an action brought by plaintiff to set aside a general assignment made to one of the defendants for the benefit of creditors, the complaint alleged that the assignment was made, executed and delivered with intent to hinder, delay and defraud the creditors of the assignor:

Held, that defendants, who were by an order of the court allowed to intervene and be made parties defendant in this action, were entitled to an order that plaintiffs deliver to them a statement in writing of the times and places at which the plaintiffs expect or intend to prove any acts or things which serve to show that the assignment was done with fraudulent intent, and to what persons and at what times and places they will claim or offer to prove that the assignor made secret or other assignments of his estate. (*Id.*)

5. Under section 531 of the Code of Civil Procedure, in an action on an accounting for goods sold and delivered, a bill of particulars should contain an itemized statement of credits as well as debits. (*Candee* agt. *Daying*, *ante*, 452.)

6. *Williams* agt. *Shaw* (4 *Abb. Pr.*, 209) disapproved of and the cases distinguished where the action is on account between the parties and where it is a claim of one party. (*Id.*)

7. An order directing a bill of particulars is not reviewable here, unless it clearly transcends the power of the court granting it, as defined by the general course of practice in regard thereto. (*Witkowski* agt. *Paramore*, 93 *N. Y.*, 467.)

8. The scope of such an order is ordinarily a question of discretion. (*Id.*)

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9. Plaintiff's complaint alleged in substance that he was the equitable owner of a claim which was assigned by L., the nominal owner, to defendants, to be collected by them "for the account and benefit of plaintiff;" that defendant collected the same, but refused to pay over. Defendant P., who alone appeared, set up in his answer, among other things, that the claim was originally assigned to defendants by L. as collateral security for a loan and advances made to him by them, and thereafter was absolutely assigned in satisfaction of an indebtedness "for money loaned, advanced, expended and paid out" by defendants for L., and for a further consideration of \$800. An order was granted requiring said defendants to furnish a bill of particulars of the alleged loans and advances, stating the date and amount of each, whether made by check or otherwise, and whether made to L. in person, if not, to whom, and by which of the defendants: *Held*, that the order was not broader than the court had the power to grant, and so was not reviewable here. (*Id.*)

BURDEN OF PROOF.

1. Upon settlement of the accounts of executors a claim against the estate, based upon an alleged contract with the deceased, which was presented and sworn to in the ordinary manner, was allowed and paid by the executors: *Held*, that the burden was upon the contestants to show that it was not a just debt, and in the absence of such evidence it was properly allowed. (*In re Frazer*, 92 N. Y., 239.)

CALENDAR.

1. A preference on the calendar of this court of an action for dower, authorized by the Code of Civil Procedure (*sec.* 791, *subd.* 6), can be claimed only when the proof

required, *i. e.*, that plaintiff "has no sufficient means of support aside from the estate in controversy," was made and an order allowing the preference obtained as required (*sec.* 793), before the notice of argument was served. (*Bartlett agt. Musliner*, 92 N. Y., 646.)

2. Where in an action in which the people were parties, and appeared by the attorney-general, the latter did not, at the time of serving notice of argument, give notice of a particular day in the term on which he would move it, as prescribed by the provision of the Code of Civil Procedure (*sec.* 791, *subd.* 1), to entitle the cause to a preference, but served with the notice of argument notice of motion that the cause be set down for a day named, which motion failed because the court adjourned before the day specified for making it: *Held*, that the action was not entitled to a preference. (*People ex rel. agt. Kinney*, 92 N. Y., 647.)

CANALS.

1. When the Chenango canal was constructed defendants' grantor owned lot No 5, and plaintiffs' grantor owned lot No. 2, which adjoined five on the west. The state, previous to 1837, appropriated a strip of land from the east side of lot 5, and adjacent to lot 2 (appropriating no part of lot 2), for the Chenango canal. The persons interested in the premises never exhibited to the appraisers a statement of their claims. No appraisal was made of the damages and benefits resulting to them on account of the appropriation, and nothing was paid by the state for the land taken. The canal was completed in 1837, and was operated until May 1, 1878, when it was abandoned pursuant to chapter 404, Laws of 1877. In 1862 the plaintiff became, and has since remained, the owner of

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lot 2, east of and adjacent to the canal, and on the side opposite to the defendants' lot. In 1878 the defendants became, and have since remained, the owners of lot No. 5, on which the canal was built. In March, 1882, the plaintiff executed the release required by section 1 of chapter 551 of Laws of 1880, which was filed with and approved by the superintendent of public works, and recorded in Broome county pursuant to chapter 288 of Laws of 1881. In 1882 defendants entered upon the land east of the center line of the canal and damaged it, for the recovery of which this action is brought:

Held, first, that under 1 Revised Statutes (sec. 16; *Id.* [7th ed.], 629, sec. 16), the canal commissioners had power to appropriate land for the use of the canal.

Second. Entering upon the land and constructing the canal, amounted under the statute to a legal appropriation of all of the land within the blue or external lines of the canal. The legality or completeness of the appropriation did not depend upon a prior assessment or payment of damages.

Third. That the state acquired a fee or permanent interest in the land, which survived the abandonment of the canal, and which could be granted to the adjoining owner by the legislature.

Fourth. That plaintiff, by his compliance with the requirements of section 1 of chapter 551 of the Laws of 1880, derived from the state a title to the land in question which cannot be overthrown. (*Birdsall* agt. *Cary*, ante, 358.)

CASE.

1. After a referee had made his report in favor of plaintiff, the latter, as a consideration of its delivery, executed an agreement giving to the former a first lien, for his fees, "upon the judgment

and claim of the plaintiff," the same to be paid "out of the first moneys collected * * * upon said judgment or any subsequent judgment that may be recovered." Both plaintiff and the referee knew at the time that defendant intended to appeal: *Held*, that the referee was disqualified from settling the case; that plaintiff, having, by his own act, thus created the disqualification, and amendments having been served to the case as proposed, he was not entitled, as of course, to the benefit of the provision of the Code of Civil Procedure (sec. 997) which, in the case of disability of a referee, permits the court to prescribe the manner of settling the case but that an order setting aside the report and judgment entered thereon was in the discretion of the court and so was not reviewable here. (*Leonard* agt. *Mulry*, 93 N. Y., 392.)

CERTIORARI.

1. Though some of the grounds upon a motion to quash a writ of *certiorari* may be well taken, the case should be disposed of upon the merits where quashing the writ would simply remit the parties to another proceeding, and would necessarily result in greater delay. (*The People ex rel. Second Avenue R. R. Co.* agt. *Com'rs Public Parks*, ante, 293.)
2. The provisions of chapter 16 of the Code of Civil Procedure in reference to appeals do not apply to an appeal in a proceeding by *certiorari* commenced prior to September 1, 1880 (*Code*, sec. 3347, subd. 11). (*People ex rel. agt. French*, 92 N. Y., 306.)
3. Upon a writ of *certiorari* brought to review proceedings of the board of police commissioners of the city of New York, in dismissing a member of the police force,

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only errors of law materially affecting the rights of the party may be corrected. (*People ex rel. agt. Bd. Police Comm'rs*, 93 N. Y., 97.)

4. If there was evidence to sustain the charge, sufficient so that the verdict of a jury finding the facts would not be set aside as against the weight of evidence, the decision of the board may not be reviewed here. (*Id.*)

CHALLENGE OF JURORS.

1. Upon the trial of an indictment for murder a juror, challenged by the prisoner for principal cause, testified, in substance, that he had read and talked about the case, and had formed an opinion as to the guilt or innocence of the prisoner, but that such opinion would not, as he believed, influence his verdict, and that he could render an impartial verdict: *Held*, that the challenge was properly overruled (*Code of Criminal Procedure*, sec. 376). (*People agt. Cornetti*, 92 N. Y., 85.)

CHATTEL MORTGAGE.

1. The non-filing of a chattel mortgage does not render it invalid as between the mortgagor and mortgagee. (*Pancoast agt. American Heating and Power Co.*, ante, 49.)
2. Where a chattel mortgage gives to the mortgagor a right of possession till the payment of the mortgage debt be demanded, he has an interest in the mortgaged property that may be levied upon and sold. (*Lyman et al. agt. Bowe*, ante, 481.)

CHILDREN.

1. Where a child under sixteen years of age was tried and convicted by

the court of special sessions of the city of New York, of petit larceny, and committed by the magistrate to the House of Refuge for the term of three months, and was taken by the sheriff to said House of Refuge, and was there tendered to the superintendent and managers thereof, but the said superintendent and managers refused to receive him, for the alleged reason that he was committed for a specified time, and the sheriff returned the prisoner to the city prison; on *habeas corpus*:

Held, that there is no justification for the prisoner's detention in the city prison, and, as the House of Refuge has refused to receive him from the sheriff, that he is entitled to his discharge. (*Matter of Lewinski*, ante, 175.)

2. Is the House of Refuge such an institution as is described in section 4 of chapter 496 of the Laws of 1881, and therefore bound to receive the relator on the commitment of the court of special sessions, *quære*. (*Id.*)
3. A child under the age of fourteen years who is found engaged in the occupation of collecting refuse from any market in a public street in the city of New York, is guilty of an offense punishable under the acts of 1877, and the act of 1881 amending the same, and may be committed by such magistrate to certain incorporated institutions, among which is the New York Catholic Protectory. (*Matter of Serafino*, ante, 179.)
4. A police justice has the power and jurisdiction to so commit. (*Id.*)
5. Such magistrate has the power, under the laws of 1882, to determine the age of the child by personal inspection. He is not obliged to direct an examination by a physician for that purpose. (*Id.*)

6. The court has no power on *habeas*

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corpus to retry the questions of fact on which the findings of a court of original jurisdiction must be presumed to have been predicated. (*Id.*)

7. The New York Juvenile Asylum of the city of New York have power, under the eighteenth section of their charter, in their discretion, to bind out a child who is under the age of fourteen and above the age of seven years, and who has been committed to said asylum by a police justice after having been proved by competent evidence to be embraced within the eighteenth section of the act, entitled "An act relative to the powers of the common council of the city of New York and the police and criminal courts of said city, approved January 23, 1883." (*Matter of Forsyth, ante*, 180.)

CODE OF PROCEDURE.

1. Section 135 — Where a summons was served upon a non-resident infant defendant in a foreclosure action, under the provisions of this section of the old Code, it was sufficient if, in addition to the required publication, a copy of the summons and complaint were deposited in the post-office directed to the infant at its place of residence. Personal service of the papers upon the infant, or service by mail or personally upon its father, mother or guardian, was unnecessary. (*Home Ins. Co. agt. Head*, 30 *Hun*, 405.)
2. Section 135 — In an action to foreclose a mortgage the summons was served upon the unknown heirs of one Ringland, the owner of the equity of redemption, under an order made in pursuance of subdivision 5 of section 135 of the Code of Procedure, as amended in 1860. It was granted upon an affidavit made by the plaintiff's attorney, which stated no reason why it was not made by the plain-

tiff. It stated the death of Ringland; that the deponent had made diligent search and inquiry for his heirs-at-law and next of kin, but had been unable to find any of them or any of his relations; that he had visited Ringland's former neighbors and could only hear that he once had a sister but could not find out her name or residence: *Held*, that the affidavit, thus made by the attorney, was defective in that it did not show that the names or residences of the parties in interest were unknown to the *plaintiff*, and in that it failed to state the sources from which the attorney's information was derived. (*Piser agt. Lockwood*, 30 *Hun*, 6.)

3. Sections 334, 355, 336, 338, 340 — After two sureties, A. and B., had executed a joint and several undertaking under sections 334 and 338 of the old Code for a stay of proceedings on appeal, A. justified, but when subsequently B. was examined, the justice before whom the examination took place filed a memorandum that he was not qualified, and that defendant in the action must produce another surety. Meantime, intermediate the filing of the memorandum and the entry of an order thereon, the defendant executed the undertakings upon which this action was brought, which were approved:
Held, that by the memorandum and order referred to, the justice approved of A. as one of the sureties upon the undertakings; that it was not necessary that A. should join in the execution of the undertakings with defendant, and even if A. is not liable upon his undertaking for want of a formal indorsement of approval upon it, the defendant should not be relieved from liability on his undertakings, which stayed plaintiff's proceedings. (*Hooker agt. Townsend, ante*, 349.)
4. Section 285 — Pending a contest

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as to the validity of a will a special administrator was appointed. A judgment had been recovered against the decedent prior to his death. An attachment against the judgment creditor was sought to be executed upon the judgment by service of copy upon the executrix named in the will. The special administrator was then acting, and the contest was then and is still pending: *Held*, that the executrix had no power to represent the estate, and so was not the "individual holding such property" within the meaning of the provision of the Code of Procedure (*sec.* 235), authorizing the execution of an attachment by service of a copy; that, therefore, the judgment was not reached by the attachment; and that an order of the surrogate denying an application of the attachment creditor for the payment of the same to him was proper. (*In the Matter of the claim of Flandrow*, 92 N. Y., 256.)

CODE OF CIVIL PROCEDURE.

1. Section 66—In an action of ejectment brought to recover the possession of land and damages for the withholding thereof, the defendant pleaded a "counter-claim to the damages demanded," consisting of taxes paid and improvements and repairs made to the premises, the amount of which he sought to set off in extinguishment or reduction of the plaintiff's claim for damages: *Held*, that as this claim did not constitute a cause of action, but could only be applied to reduce the damages which the plaintiff might recover (*Code of Civil Procedure*, *sec.* 1531), it did not constitute a "counter-claim" within the meaning of that term, as used in this section of the said Code, giving the attorney of the defendant a lien thereon, and preventing the parties from settling the action without his consent. (*Pierson agt. Safford*, 30 Hun, 521.)
2. Section 191 — The complaint herein set forth a demand for \$398.71; the answer denied liability and set up a counter-claim for \$301.29. The trial court found with defendant and gave judgment against plaintiff for the counter-claim. The general term reversed the judgment: *Held*, that the amount of the two claims constituted "the matter in controversy," within the meaning of this section of the Code of Civil Procedure (*subd.* 3), and that this court had jurisdiction on appeal. (*Crawford agt. W. S. Bank*, 92 N. Y., 631.)
3. Section 190, 1336, 1349, 1350 — An appeal may be taken to the general term from an interlocutory judgment (*Code of Civil Procedure*, *sec.* 1349), but such a judgment can only be reviewed in this court on appeal from the final judgment. (*Victory agt. Blood*, 93 N. Y., 650.)
4. Section 191 — The complaint alleged that the property purchased was much less in value than the amount of stock issued in payment therefor. The directors of the W. U. T. Co. were made parties defendant, and judgment was asked against them individually for the amount the stock payment exceeded the value of the property, and for the amount of the stock dividend in case it had been issued and distributed. The corporation alone appealed from the order of the general term which reversed the judgment in favor of defendants and granted a new trial, giving the prescribed stipulation, for judgment absolute in case of affirmance: *Held*, that the appeal was proper. (*Williams agt. Western Union Telegraph Co.*, 93 N. Y., 162.)
5. Section 381 — An action for a partnership accounting, where the articles are under seal, is not barred until twenty years.
Where the defendant, by the partnership agreement, agreed to

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pay one-half the losses and expenses and has failed to do so, and plaintiff, under his partnership liability to third persons, has paid the whole, the basis of an action by plaintiff to recover one-half the sums paid by him is the defendant's covenant to pay over half and its breach. (*Devinelle* agt. *Eddy*, ante, 328.)

6. Section 383—Plaintiff's complaint alleged that defendant "improperly, carelessly, negligently and unlawfully suffered ice and snow to be and remain upon the cross-walk," at the intersection of two streets in the city of New York; that in consequence thereof plaintiff, while passing over said cross-walk, was thrown to the ground and injured, and plaintiff asked to recover the damages sustained: *Held*, that the action was "to recover damages for a personal injury resulting from negligence," within the meaning of the provision of this section of the Code of Civil Procedure limiting the time for the commencement of such action to three years. (*Dickinson* agt. *The Mayor, etc.*, of *City of New York*, 92 *N. Y.*, 584.)

7. Sections 383, 414—Plaintiff was injured by reason of defendant's negligence in April, 1877. She commenced this action to recover damages in January, 1880: *Held*, that the statute of limitations was not a bar, as the case was governed by the three years limitation prescribed by the Code of Civil Procedure (*sec.* 383, *subd.* 5); not by the one year rule previously existing (*sec.* 7, *chap.* 431, *Laws of 1876*); that the case was not within the exception in the provision of said Code (*sec.* 414), making the rule of limitations therein prescribed the only one thereafter applicable to civil actions, except where a person was entitled, when the Code took effect, to commence an action, and did so within two years thereafter (*Acker* agt. *Acker* 81 *N. Y.*,

143, *distinguished*). (*Watson* agt. *Forty-second Street, &c.*, *R. R. Co.*, 93 *N. Y.*, 522.)

8. Section 295—April 2, 1875, the defendant's intestate conveyed certain real estate to his three sons. The deed contained a clause providing that the premises were conveyed to the grantees "subject to the following amounts due by me to the parties hereafter specified, which forms a part of the consideration above expressed; and which I charge the said estate above conveyed with the payment thereof; and which several amounts, together with the interest, the said parties of the second part assume and agree to pay, to Daniel De Freest (the plaintiff), about \$600 * * * together with the legal interest thereon." The deed was accepted by the grantees. In an action against the administrators of the grantor to recover the amount of the said debt, brought after the grantees, in an action brought against them, had been held to be discharged from liability therefor: *Held*, that the clause in the deed was a sufficient written acknowledgment of the debt by the grantor, within this section of the Code of Civil Procedure, to take the case out of the statute of limitations. (*De Freest* agt. *Warner*, 30 *Hun*, 94.)

9. Sections 410, 414—April 5, 1872, the defendant's testator died, leaving a will by which he bequeathed to the plaintiff a legacy of \$400, with interest to commence one year after his death. The plaintiff who resided in Missouri, claimed to have been informed by the executor, the defendant, that the deceased had left her a legacy of \$300, payable at a future time, for which he would then give her \$280; that relying upon this statement she accepted the said sum and gave him a receipt for \$300. In February, 1881, she was first informed of the amount of the legacy left to her, and in June,

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1881, she commenced proceedings in the surrogate's court to compel the payment of the balance due her thereon. The executor had never filed any inventory, nor had he had his account judicially settled: *Held*, that although prior to the adoption of the Code of Civil Procedure there was no statute of limitations applicable, in express terms, to such proceedings in a surrogate's court, yet, as the plaintiff then had a concurrent remedy by action at law, the statutory limitation applicable to the latter was also applicable to the former proceeding. That as the plaintiff's right of action was not barred by the statutes in force at the time of the adoption of the first part of the Code of Civil Procedure, September 1, 1877, and as it did not fall within any of the exceptions specified in section 414 thereof, it was thereafter governed by the rules therein prescribed. That as section 9 of 2 Revised Statutes, 114, giving a right of action for a legacy, and section 1819 of the Code of Civil Procedure, which took the place of the said section of the Revised Statutes upon its repeal by chapter 245 of of 1880, required a demand for the legacy to be made upon the executor before any action could be brought therefor, the limitation applicable to the cause of action thereby given was prescribed by section 410 of the said Code. That as this case fell within the first of the exceptions specified in the said section, and as by it the time is to be computed only from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends, the statute did not begin to run against the plaintiff's cause of action until February, 1881. That as the plaintiff had a right to maintain an action at law to recover the legacy at the time these proceedings were instituted in the surrogate's court, they were not barred by the statute of limita-

tions. Subdivision 3 of section 414 of the Code of Civil Procedure was not intended to deprive any cause of action of the remedial provisions of the new Code in respect to the limitation of actions, to which it would be entitled otherwise (*House agt. Agate*, 3 *Redf. Sur. R.*, 307, *criticised and distinguished*). (*Drake agt. Wilkie*, 30 *Hun*, 537.)

10. Section 410 — The provision of this section providing that where "a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete," is applicable to actions against the city of New York.

Such an action is not saved from the operation of said provision by the provision (*sec. 3341*) declaring that "any special provision of the statutes remaining unrepealed * * * which is applicable exclusively to an action" against said city shall not be affected by the Code. (*Dickinson agt. The Mayor*, 92 *N. Y.*, 584.)

11. Sections 414, 452 — Where, during the pendency of proceedings for an accounting instituted by the receivers of an insolvent insurance company, one of the receivers dies, the court has power to make an order reviving and continuing the accounting against his executors and directing them to come into such accounting and stand by such orders and decrees as may be made therein (*Matter of Foster*, 7 *Hun*, 129, *followed*). (*Matter of Columbian Insurance Co.*, 30 *Hun*, 342.)

12. Sections 416, 723, 3165 — Where a summons issued out of the marine court of the city of New York, in an action wherein an attachment and order directing service by publication was granted, which stated the time within which defendant was required to

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answer at six days, instead of ten, as required by the Code of Civil Procedure (*sec. 3165, subd. 2*): *Held*, that the defect was not a jurisdictional one, but an irregularity merely; that the court obtained jurisdiction of the action from the time of granting the attachment (*Code, sec. 416*); that the summons, therefore, was amendable (*sec. 723*); and that an order amending it *nunc pro tunc* was properly granted. (*Gribbon et al. agt. Freel, 93 N. Y., 93.*)

13. Sections 421, 422—An order extending time to answer is equivalent to a notice of appearance. (*Krause agt. Averill, ante, 97.*)

14. Section 439—Since the amendment of 1879, of this section of the Code of Civil Procedure, providing for order for publication of summons to be served on a non-resident defendant, the actual presentation of the particular verified complaint to the judge is unnecessary. Where there is a verified complaint on file in the county clerk's office and the affidavit presented for the order of publication sets forth such fact and annexes a copy thereof it is sufficient.

A clerical error in the order of publication, *i. e.*, mistake in the first name of one of the defendants, "Albert instead of Alfred," where the affidavits and the copies of order also summons and notice served on defendant contain the correct name, is not sufficient to vitiate the service.

Nor is the omission of the words "without the state" from the notice sufficient to render the service void.

When the summons and complaint are served on the defendants personally, without the state, a copy need not be mailed to them. (*McCully et al. agt. Heller et al., ante, 468.*)

15. Section 439—When the allegations in the papers on which an order for the service of a sum-

mons by publication was issued was as follows: The affidavit alleged "that as deponent is informed and believed that the defendants are not residents of this state, but reside in the city of Laredo, state of Texas, as deponent is informed by defendants themselves in letters received from them at said place." Also, "that deponent has caused a summons and complaint to be issued in this action against the said defendants to the sheriff of the city and county of New York, but that said defendants cannot be found, after due diligence, within this state, and that deponent is informed and believes that said defendants are now in the city of Laredo, state of Texas." The complaint states that the defendants are, and at all times hereinafter mentioned, were co-partners, doing business in the city of Laredo, state of Texas, under the firm name of Tomas Dwyer & Co.:

Held, that this was not sufficient under this section of the Code of Civil Procedure to authorize the granting of this order. (*Greenbaum agt. Dwyer, ante, 266.*)

16. Sections 440, 443—Service of a summons upon a non-resident infant defendant in partition not necessary, provided the infant voluntarily appear in the action by its guardian *ad litem*.

The insertion of the words "by publication" instead of the words "without the state of New York," in the notice indorsed upon the summons served personally without the state, under an order of publication, is not a valid objection to title—it is not jurisdictional. (*Thistle et al. agt. Thistle et al., ante, 472.*)

17. Section 440—Under this section of the Code of Civil Procedure, providing for the service of a summons upon a non-resident, it is sufficient if the order directs the service to be made by publi-

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cation and by depositing the proper papers in the post-office. It is not necessary that it should also provide that the service may, at the option of the plaintiff, be made on the defendant personally without the state. (*O'Neil agt. Bender*, 30 *Hun*, 204.)

18. Sections 447, 448—An action which seeks to enjoin payment of money to individuals, cannot be maintained without making them parties to it.

He who is deprived of his property, or what he claims to be his, is entitled to be heard, and no judgment can be rendered depriving him of that which he claims to be his, without bringing him before the court, which is asked to determine his rights. (*Smith agt. Crissey*, *ante*, 112.)

19. Section 451—The provision of the Code of Civil Procedure, authorizing a plaintiff, who is ignorant of the name of a defendant, to designate him in the summons by a fictitious name, implies an action commenced, and a defendant sued, or intended to be sued, whose name is unknown; it does not permit the use of such a name applicable to no particular individual, but adopted as an expedient to cover the name of a person whose name is known, who is not sued or intended to be sued at the outset, and thus permit him to be brought in, in case plaintiff discovers, at some later period, that he should have been made a defendant.

In an action brought to test the validity of certain town bonds, and to restrain their transfer pending the litigation, the Bank of O. was made a defendant. Fictitious names were used to designate defendants whose names were unknown. Upon an affidavit averring that V. W., the president of said bank, had testified that he at one time owned \$30,000 of said bonds and had disposed of them, and that S., the cashier of said

bank, had had the custody of many bonds and knew their owners, an order was obtained for their examination before trial. No official action on the part of the bank was averred, and it was not named either in the affidavit or order as one of the parties to be examined. Neither V. W. nor S. was named as a defendant: *Held*, that the order was properly vacated; that there was no right to examine the officers as such and by virtue of their relation to the bank; that it could not be claimed that they were sued by the fictitious names, or that they were expected to be adverse parties (*Code*, sec. 870); and that they could not be examined as witnesses, as no case was made for their examination as such. (*Town of Hancock agt. The First National Bank*, 93 *N. Y.*, 82.)

20. Sections 791, 793—A preference on the calendar of this court of an action for dower, authorized by the Code of Civil Procedure (*sec. 791 subd. 6*), can be claimed only when the proof required, *i. e.*, that plaintiff "has no sufficient means of support aside from the estate in controversy," was made and an order allowing the preference obtained as required (*sec. 793*), before the notice of argument was served. (*Bartlett agt. Musliner*, 92 *N. Y.*, 646.)

21. Sections 500, 514—A plaintiff cannot, in his reply, plead an independent counter-claim to a counter-claim set up by the defendant. (*Cohn et al. agt. Hussion*, *ante*, 150.)

22. Section 501—A claim for the wrongful conversion of a chattel, which is a cause of action arising out of a tort, cannot be set up by way of a counter-claim in an action arising upon contract. (*Bell agt. Lesbini*, *ante*, 385.)

23. Section 501—In an action for the alleged wrongful taking and

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conversion of a quantity of wood, defendant set up as a counter-claim, in substance, that he held a bond and a mortgage as collateral upon certain lands which were insufficient security, and the obligor was insolvent; that plaintiff being a second mortgagee in possession of the lands, with knowledge of the facts and with intent to reduce, and deprive defendant of, its security, and to defraud it, wrongfully cut the wood in question from the said land, thereby wasting the land, &c., to defendant's damage; that on foreclosure of defendant's mortgage and sale thereunder, a large deficiency was left: *Held*, that defendant's claim was "connected with the subject of the action" within the meaning of this section of the Code of Civil Procedure, and so constituted a proper counter-claim.

A counter-claim must have such a relation to the subject of the action that it will be just and equitable that both should be settled by one litigation, and that the claim of the defendant should be offset against or applied upon that of the plaintiff. (*Carpenter* agt. *Manhattan Life Ins. Co.*, 93 N. Y., 552.)

24. Section 531 — In a suit to recover the proceeds of the sale of plaintiffs' goods by defendants, as agents, less their commissions, under a contract, the defendants set up a counter-claim for commissions upon other goods, under said agreement. The plaintiffs replied that the other goods sold were under contracts excepted from the agreement:

Held, that defendants are not entitled to a bill of particulars of such contracts, and of the goods furnished under them.

A party can only be required to state the particulars of his own cause of action or defense, and not the cause of action or defense of the adverse party. (*The John S. Way Manufacturing Company* agt. *Corn et al.*, ante, 152.)

25. Section 531 — Under this section of the Code of Civil Procedure, in an action on an accounting for goods sold and delivered, a bill of particulars should contain an itemized statement of credits as well as debits.

Williams agt. *Shaw* (4 Abb. Pr., 209) disapproved of and the cases distinguished where the action is on account between the parties and where it is a claim of one party. (*Candee* agt. *Daying*, ante, 452.)

26. Sections 531, 546, 1897 — Where, in an action to recover penalties for violation of the excise laws the complaint charged that the plaintiffs were overseers of the poor, &c., and that the defendant was, on the 12th day of May, 1883, keeper and proprietor of a hotel known as the "Mansion House," in the town named, and on that day at said hotel, in violation of the provisions of chapter 628 of the Laws of 1857, and the statutes amendatory thereof, he "sold strong and spirituous liquors and wines in quantities of less than five gallons at a time, viz., one gill of brandy, one gill of whisky, one gill of gin, one gill of wine, one gill of alcohol, one gill of rum, one gill of ale, one gill of beer, without having a license therefor granted according to the provisions of said statutes, whereby defendant became indebted and liable to plaintiffs in the sum of fifty dollars forfeiture and penalty imposed by said statutes." On motion to make the complaint more definite and certain, or for a bill of particulars:

Held, that the complaint is framed under and according to the rules and requirements of the common law, and is sufficient, as against the objection, that the reference to the law under which this action is brought is indefinite and uncertain. As a common-law pleading it is sufficient that the complaint charges in due form and sufficient particularity the

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commission of the offense declared by the statute, with general reference to the law giving the right of action for the penalty.

An indorsement on the summons referring to the statute is not necessary where service of a copy of the complaint accompanies it.

Held, further, that the plaintiffs should either make the complaint more definite and certain by amendment, stating the name and names of the person to whom the sales charged therein were made, or serve on defendant's attorney a bill of particulars giving such information, or in case of inability to give the name and names of such persons, then by stating grounds for the omission. (*Kee* agt. *McSweeney*, ante, 447.)

27. Section 532 — The complaint in this action alleged, among other things, the recovery by the plaintiff's assignee of a judgment in the supreme court against the defendant for \$1,065.18, and that "said judgment was on said 11th day of May, 1860, duly docketed against said defendant in the office of the clerk of Monroe county." This action was brought in 1879 to recover the amount due upon the said judgment: *Held*, that under this section of the Code of Civil Procedure, the judgment was sufficiently pleaded. (*Springsteene* agt. *Gillett*, 30 *Hun*, 260.)

28. Section 536 — *It seems*, that under this provision of the Code of Civil Procedure, providing that in an action to recover damages for an injury to person or property, "the defendant may prove at the trial facts not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer," a defendant in such an action is precluded from proving circumstances by way of mitigation only, which are not so set forth. (*Bradner* agt. *Faulkner*, 93 *N. Y.*, 515)

29. Section 542 — In an action brought against four defendants, the answer was duly verified by one and was served September twelfth, and on September twenty-ninth plaintiff served notice of motion to strike out the answer of defendants as to the other three, and as to them to treat it as a nullity for the reason that they were not united in the verification. On October second, and within twenty days after the service of the first answer, the defendants served an amended and properly verified answer by all the defendants, who united in the verification thereto:

Held, that the service of the amended and properly verified answer is a perfect answer to this motion, and must defeat the same, but without costs.

Held, also, that as the plaintiff was right in serving notice of motion, because the first answer was improperly verified, no costs should be allowed to defendants. (*Rider* agt. *Bates*, ante, 129.)

30. Section 549 — Subdivision 3 of this section of the Code of Civil Procedure, authorizing the granting of an order of arrest in an action brought to recover money, funds, credits or property, held or owned by the state, or for or on behalf of a public or governmental interest, * * * which the defendant has without right obtained, received, converted or disposed of, does not authorize such an order to be granted in an action brought by the people to recover property which is alleged to have been forfeited to the state by reason of the defendant's having offered the same for sale or distribution, in violation of the provisions of the Penal Code against lotteries. (*People* agt. *Phillips*, 30 *Hun*, 553.)

31. Section 550 — The temporary retention of chattels alleged to have been stolen, pending the

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prosecution of the alleged thief, is within the police power.

The property clerk of the police department in the city of New York is merely the agent of the criminal court pending the prosecution, and holds such property subject to its orders.

While the circumstances justify the retention as above stated, the owner's right of possession cannot be enforced by action for the claim and delivery of personal property.

Accordingly *held*, that an application under this section of the Code of Civil Procedure was properly denied for an order of arrest in such an action against the property clerk, who refused to deliver up property so held by him to the sheriff, who demanded possession under a requisition requiring him to replevy it. (*Simpson et al. agt. St. John*, 93 N. Y., 363.)

32. Section 566—Where an order of arrest is procured and executed more than twenty days after the service of the summons and complaint, the defendant has, by this section of the Code of Civil Procedure, twenty days after such arrest to serve an answer. (*Clady agt. Wood*, *ante*, 1.)

33. Sections 580, 581—Where a sheriff has been discharged from liability under an order of arrest by the justification and allowance of bail as prescribed by these sections of the Code of Civil Procedure, the court has no power to renew his liability.

Where, therefore, a notice of justification was duly served, and plaintiff not appearing, the bail was approved by default: *Held*, that the court had no power to open the default. (*Lewis agt. Stevens*, 93 N. Y., 57.)

34. Section 603—An injunction may be issued to restrain interference with the plaintiff's possession in an action to determine claims

to real estate. (*Stamm agt. Bostwick*, 30 Hun, 70.)

35. Sections 613, 812—There is no authority for the granting of an injunction restraining the enforcement of a judgment except on an undertaking providing absolutely for the payment of the judgment, with interest and costs. (*Fullan agt. Hooper*, *ante*, 75.)

36. Sections 635, 636—Upon the application of the plaintiff, an attachment was issued against the defendants upon an affidavit which stated that "the defendants are justly and truly indebted unto this plaintiff in the sum of \$20,000 lawful money of the United States, over and above all counter-claims known to this plaintiff, for damages, for the breach of a contract, express or implied, other than a contract to marry, founded upon the following facts, to wit: For work, labor and services done and performed, and caused to be done and performed, by the plaintiff to and for said defendants, and at the special instance and request of the defendants, in consideration that the defendants had agreed and undertaken to pay to plaintiff therefor whatever said work, labor and services were reasonably worth, and which work, labor and services consisted in the examination, location and reporting on mines and mining property located in Arizona, and in which the defendants claim to have an interest, and in obtaining for the defendants lands, vesting in them a lawful title and interest in certain mines and mining property in Arizona, and in work for them in his (plaintiff) profession as a mining engineer; that said work, labor and services were reasonably worth the sum of \$20,000; that no part thereof has been paid, but that the sum of \$20,000 is justly due and owing from the defendants to the plaintiff over and above all counter-claims

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known to him. Said work, labor and services were performed during a period from September 1, 1882, in Arizona, to the time of the commencement of this action." The affidavit then sets out the defendant Sisson resides in California and the defendant Safely in Indiana:

Held, that the affidavit fails to show that there has been a breach of the alleged contract between the plaintiff and the defendants, and the attachment should be vacated. (*Smadbeck* agt. *Sisson*, ante, 220.)

37. Sections 635, 636 — In an affidavit on an application for an attachment the *cause of action* was stated on *information and belief*, but the *non-residence* of the defendants was alleged *positively*. On motion to vacate the attachment:

Held, that the cause of action being stated on information and belief, and the sources of the information not being given, the attachment must be vacated. Such a verification is proper in a pleading, but not in an affidavit to obtain an attachment. (*King* agt. *Southwick et al.*, ante, 282.)

38. Section 636 — An attachment was granted herein upon an affidavit made by one of the plaintiffs' attorneys, in which he stated that the amount named was due to the plaintiffs "over and above all counter-claims, discounts and set-offs known to the plaintiffs or the deponent." The affidavit stated that it was made by the attorney, because the plaintiffs resided out of the county, and that deponent's knowledge as to the debt was derived from a statement of the account upon which the action was founded, sent to him by his clients in a letter: *Held*, that the attachment was properly vacated upon the moving papers, as the affidavit did not show either that the attorney had any knowledge, or the sources of his knowl-

edge, that the amount named was due, over and above all counter-claims known to the plaintiffs. (*Cribben* agt. *Schillinger*, 30 Hun, 248.)

39. Sections 638, 788 — Under the provision of the Code of Civil Procedure (*sec.* 638), requiring the service of the summons, in an action wherein an attachment has been granted, "within thirty days after the granting thereof," when the thirtieth day comes on Sunday it must be excluded, and a service upon the next day meets the requirement (*Sec.* 788). (*Gribbon* agt. *Freel*, 93 N. Y., 93.)

40. Section 647 — This section of the Code of Civil Procedure, authorizing the attachment of shares of the defendant in a corporation, does not apply to shares of stock in a foreign corporation.

The shares of a non-resident defendant in the stock of a foreign corporation cannot be deemed to be within this state, by reason of the fact that the president and other officers of the corporation are here engaged in carrying on a corporate business. (*Plympton* agt. *Bigelow*, ante, 131.)

41. Sections 682, 683 — Under these sections of the Code of Civil Procedure, a motion to vacate an attachment may be made after a judgment has been entered in the action and an execution has been issued thereon, provided the attached property or the proceeds thereof has not been actually applied to the payment of the judgment. (*Parsons* agt. *Sprague*, 30 Hun, 19.)

42. Section 682 — To sustain an application under this section of the Code of Civil Procedure by one claiming a lien, as an attachment creditor, to vacate a prior attachment, it is necessary for him to establish, by legal evidence, a subsequent valid levy under his attachment upon

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the same property covered by the prior attachment.

The opinion of his attorney that the subsequent lien has been secured, although put in the form of an affidavit, is not sufficient. (*Tim et al. agt. Smith*, 93 N. Y., 87.)

43. Section 709 — Where an attachment is vacated, the sheriff will not be required to deliver the attached property to the defendant until his costs, charges and expenses are paid.

Where, in an order vacating an attachment, the plaintiff is directed to pay the sheriff's fees, such payment will not be enforced by precept against the person as for contempt.

Whether the court can, upon motion, determine which of the parties shall pay the sheriff's charges, *quære*. (*Hall et al. agt. United States Reflector Co.*, ante, 31.)

44. Section 709 — A sheriff has a lien for his costs, charges and expenses upon property remaining in his hands after vacation of the attachment under which he seized the same, and he may sustain an action to enforce the same by a sale of the property (*Hall agt. U. S. Reflector Co.*, ante, 31, approved). (*Bowce agt. U. S. Reflector Co.*, ante, 41.)

45. Section 709 — Under this section of the Code of Civil Procedure in an action in the supreme court, triable and tried in the first judicial district, an application for an extra allowance of costs must be made in that district, although the justice before whom the cause is tried resides in another district.

The rule of the supreme court (44), requiring such an application to be made to the court before which the trial is had or the judgment rendered, does not authorize it to be made out of the district. (*Hun agt. Salter*, 92 N. Y., 651.)

46. Section 757 — Where the court upon a motion made under this section of the Code of Civil Procedure, orders an action brought by a sole surviving executor, who has since died, to be revived, and an administrator with the will annexed to be substituted in the place of the deceased executor, it may direct that his name be substituted in the record and pleading, and that the pleadings, proceedings and evidence already had and taken, stand as the pleadings, proceedings and evidence in the cause so revived. (*Wood agt. Flynn*, 30 Hun, 444.)

47. Sections 791, 793 — Where, as in this case while the fact does not appear upon the pleadings, that an order of arrest has been granted, it is apparent that the action is one in which such an order can be issued as a matter of right upon a proper application to the court, even within the provisions of section 793 it may fairly be said that the right to the preference depends upon facts appearing in the pleadings, upon which the cause is to be tried and heard, and therefore that service of a notice of a trial before making the application for a preference does not deprive the defendant of the right to such preference under the rules of practice of the court.

An inherent right to control its own calendar is vested in the court independent of all other considerations (*Robertson agt. Schellhass*, 62 How., 489, and *City Nat. Bank of Dallas agt. Nat. Park Bank*, 62 How., 495, distinguished). (*Smith et al. agt. Keepers*, ante, 474.)

48. Section 772 — A county judge can, under this section of the Code of Civil Procedure, *ex parte*, vacate an order previously made by him extending time to answer. (*Marks agt. King*, ante, 453.)

49. Section 779 — The stay of proceedings provided for by this section of the Code of Civil Pro-

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cedure begins only from the default of the party in not paying the costs. If no time is specified in the order, then this default does not exist until ten days after the service of a copy of the order, and the proceedings, therefore, are not stayed until the ten days have elapsed. (*Id.*)

50. Sections 783, 986—Where the defendants made a proper demand that the place of trial be changed to the city and county of New York, pursuant to section 986 of the Code of Civil Procedure, but omitted to serve a notice of motion upon the plaintiff's attorney within the ten days prescribed by such section:

Held, that under section 783 the court has power and will, in a proper case, relieve the defendant from the charge of laches in not serving notice of motion as required by section 986. (*Thompson* agt. *Heidenrich*, ante, 391.)

51. Section 791—Where in an action in which the people were parties, and appeared by the attorney general, the latter did not, at the time of serving notice of argument, give notice of a particular day in the term on which he will move it, as prescribed by the provision of this section of the Code of Civil Procedure (*subd.* 1) to entitle the cause to a preference, but served with the notice of argument notice of motion that the cause be set down for a day named, which motion failed because the court adjourned before the day specified for making it: *Held*, that the action was not entitled to a preference. (*People ex rel. Anguste* agt. *Kinney*, 92 N. Y., 647.)

52. Sections 797, 798—An order to show cause which provides that service of a copy on the plaintiff's attorney two days before the return day thereof shall be deemed sufficient service requires *personal service* on the attorney.

To make service by mail regular, under these sections of the Code of Civil Procedure, the order must provide for service by mail.

The fact that the papers were received more than two days before the return day does not cure the defect. (*Marcele* agt. *Saltzman*, ante, 205.)

53. Section 798—Under this section, if the service is by mail, double the time is allowed. Does a stay of proceedings prevent the obtaining of further time to answer, *quære*. (*Marks* agt. *King*, ante, 453.)

54. Sections 829, 834—The defendants in this action, heirs-at-law of the plaintiff's testatrix, contested the validity of her will, upon the grounds of a lack of testamentary capacity and of undue influence. Upon the trial the plaintiff called one Monk, the physician who had attended the deceased in her last sickness, and was allowed to prove by him what was said and done by her, at an interview had by him with her at her house at which the plaintiff was present. The plaintiff was allowed to introduce this testimony to show that the witness "made a test of the memory of the testatrix, then or thereafter, to ascertain her capacity to make a will." The witness having been instructed by the judge to avoid stating any information received by him, which was required to enable him to act as her physician, was allowed to answer the question, what was his impression in that interview as to the condition of the testatrix, whether rational or irrational, as follows: "Her gesture and conversation, language, everything that I could observe, impressed me as coming from a person of ordinary sound mind." *Held*, that the evidence was not prohibited by section 834 of the Code of Civil Procedure and was properly received (*Per SMITH, P. J.*).

The defendants called the wife

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of one of the contestants to testify to "the actions, conduct and sayings" of the testatrix, on certain occasions when the witness was at her house: *Held*, that as the deceased left real estate in which the witness would have an inchoate right of dower, if the will were declared void, she was interested in the event of the action, and so disqualified, under section 829 of the Code of Civil Procedure, from testifying as to personal transactions or communications had with the deceased. (*Steele agt. Ward*, 30 *Hun*, 555.)

55. Section 829 — This action was brought by the plaintiff upon a bond given to him by one Carpenter and Azubah, his wife, against the executor of Azubah. It was defended upon the ground that the bond was, after its execution, altered by the insertion of a clause binding the separate estate of the wife. Upon the trial the plaintiff was called as a witness in his own behalf, and testified that he was not present when the bond was signed, but that he saw it in the hands of his attorney, after it was drawn and shortly before it was executed, and that it then contained the clause in question as it appeared upon the bond: *Held*, that the evidence was inadmissible under this section of the Code of Civil Procedure, as relating to a personal transaction with the deceased: *Held*, further, that this section also prevented the plaintiff from testifying respecting conversations between himself and his attorney, prior to the execution of the bond, which tended to show that it contained the said clause. The testimony of the attorney as to such conversation was admissible as a part of the *res gestæ*. (*Pease agt Barnett*, 30 *Hun*, 525.)

56. Sections 870, 872, 873 — In an action brought to test the validity of certain town bonds, and to restrain their transfer pending the litigation, the Bank of O. was

made a defendant. Fictitious names were used to designate defendants whose names were unknown. Upon an affidavit averring that V. W., the president of said bank, had testified that he at one time owned \$30,000 of said bonds and had disposed of them, and that S., the cashier of said bank, had had the custody of many bonds and knew their owners, an order was obtained for their examination before trial. No official action on the part of the bank was averred, and it was not named either in the affidavit or order as one of the parties to be examined. Neither V. W. nor S. was named as a defendant: *Held*, that, the order was properly vacated; that there was no right to examine the officers as such and by virtue of their relation to the bank; that it could not be claimed that they were sued by the fictitious names, or that they were expected to be adverse parties (*Code*, sec. 870); and that they could not be examined as witnesses, as no case was made for their examination as such (*Secs. 872, subd. 5, 882*). (*Town of Hancock agt. First Nat. Bk.*, 93 *N. Y.*, 82.)

57. Section 834 — A physician who was called upon professionally to make an examination of T., brother of the insured, was asked "what opinion did you form, based on the general sight of the man before you made an examination, or before you had any conversation with him?" *Held*, that the question was properly excluded as privileged within the statute. (*Grattan agt. M. L. Ins. Co.*, 92 *N. Y.*, 274.)

58. Section 870 — An order should not be granted to examine a defendant before trial, in a suit for damages for alleged slander, to obtain knowledge or information of the exact language used by him in disseminating a charge that plaintiff had participated in a

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scheme of blackmail against defendant.

To entitle a party to an examination of a defendant it must appear that plaintiff has a cause of action against the defendant. Such examination will not be allowed for the purpose of informing plaintiff whether he has such a cause of action or not. (*De Leon agt. De Lima, ante, 287.*)

59. Sections 870, 881, 883 — Where an action was begun in the state court and an order thereafter obtained, under these sections of the Code of Civil Procedure requiring the defendant to appear and testify before trial, and whilst the examination of the defendant was being had under such order, he removed the cause into the circuit court under "the local prejudice act:"

Held, that although in actions at law begun in the federal courts depositions cannot be taken under the state practice, yet where, as in this case, such an examination was actually pending at the time of removal, the right to continue the same is preserved under the act of congress of 1875, and on motion the defendant will be compelled to attend and testify under the order, although the plaintiff may not be entitled to read the deposition upon the trial.

Instances in which such depositions may be used. (*Fogg agt. Fisk, ante, 343.*)

60. Section 872 — Though to entitle a party to an order for the examination of the adverse party as a witness it must appear by the affidavit upon which the application is based that there was a *bona fide* purpose to take evidence of the party to use it upon the trial, yet it is not necessary to state it in direct and positive terms. The law will be complied with when that fact shall be made to appear as one that has been established by the evidence. (*Van Ray agt. Harriott, ante, 269.*)

61. Section 880 — In actions resting upon a fraud, deceit and fraudulent conspiracy, an order for the examination of a party defendant before trial will be vacated when the object of it is to procure testimony to establish the fraud, (*Andrews agt. Prince, ante, 280.*)

62. Section 885 — In an action instituted by the attorney-general to dissolve a life insurance company, the holder of a policy in or a creditor of the corporation who has not intervened in the action should not be granted an order for the examination of a person as a witness to be used upon a motion under this section of the Code of Civil Procedure. (*Matter of Attorney General agt. Continental Life Ins. Co., ante, 51.*)

63. Section 982 — Plaintiff's complaint alleged in substance, that defendants, as trustees, held the legal title to certain hotel property situate in the county of Saratoga, and as such issued to plaintiff a certificate showing him to be entitled to an interest therein and in the rents and profits; that as such trustees defendants had declared a dividend on said certificate, which he claimed to recover. The answer averred payment of the dividend. The venue was laid in the county of New York; on motion to change the place of trial to Saratoga county: *Held*, that the action was not to determine or affect any interest in land within the meaning of the provision of this section of the Code of Civil Procedure, requiring such action to be tried in the county where the subject of the action or some part thereof is situated; but that the action was in the nature of one for moneys had and received, and so was triable in New York. (*Roche agt. Marvin, 92 N. Y., 398.*)

64. Section 982 — The plaintiff in his character as receiver not only seeks to recover the interest of S. E. in the estate of his father,

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which consists of both real and personal property situate in the city of New York, but also that a certain assignment executed by S. E. to H., which released an interest in such estate of said H. E., deceased, comprising real as well as personal property derived by S. E. under and by virtue of the will of his father. On motion to change place of trial:

Held, that the action is within that portion of this section of the Code of Civil Procedure, which is as follows: "And every other action to recover or procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real." (*Thompson* agt. *Heidenrich*, ante, 391.)

65. Section 984—This action was brought by the plaintiff against the defendant, her husband, to recover money alleged to have been received by him for her. At the time of the commencement of the action the defendant was, and for many years previous thereto he had been a resident of the county of Kings. The plaintiff was at that time, and since July, 1881, had been a resident of Middletown, Orange county, living apart from her husband under an agreement of separation. She claimed to have left him on account of his cruelty and ill-usage: *Held*, that an application to change the place of trial from the county of Orange to the county of Kings, made by the husband, upon the ground that his domicile, and therefore that of his wife, was there fixed, was properly denied. The distinction between residence and domicile is recognized by the Code of Civil Procedure, and it is the residence and not the domicile of the parties which determines the place at which the action should be tried. (*Lyon* agt. *Lyon*, 30 *Hun*, 455.)

66. Section 1000—A county court

has no power upon the trial of an action, to nonsuit the plaintiff and order the exceptions to be heard in the first instance at the general term, staying all proceedings in the meantime. (*Johnson* agt. *N. Y. O. and W. R. R. Co.*, 30 *Hun*, 166.)

67. Section 1009—In a proceeding to foreclose a mechanic's lien after trial before the court had begun, and near the conclusion of the direct-examination of the plaintiff, the owners demanded that the issues between them and their codefendants, who claimed as lienors, should be tried by jury. The court overruled the demand on the ground that it was too late: *Held*, no error; that the right, if any existed, was waived by failing to claim a trial by jury before the production of any evidence (*subd.* 4); but *held*, that as the action was in equity no such right existed. (*Kenney* agt. *Appar et al.*, 93 *N. Y.*, 539.)

68. Section 1013—A compulsory reference can only be ordered when the trial requires the examination of a long account. (*O'Reilly* agt. *City of Kingston*, 30 *Hun*, 508.)

69. Section 1018—This action was brought by the plaintiff's intestate to rescind a conveyance of real estate made by him to the defendant. The real estate was sold January 18, 1881, at the price of \$3,000, the vendor taking in payment thereof a bond and mortgage for that amount, given to the defendant by one Brown, the whole principal sum secured thereby being then unpaid, together with some interest, which latter amount was paid by the intestate to the defendant. The complaint alleged that the intestate was induced to take the said bond and mortgage by certain false representations fraudulently made by the defendant, respecting the pecuniary responsibility of the mortgagor and

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the property owned by him and the value of the mortgaged property. The referee found the misrepresentations to have been substantially as alleged, but found that they were not fraudulently made, but that the defendant as well as the intestate believed them to be true when made, and that there was a mutual mistake of facts which entitled the intestate to a rescission. Instead of ordering a judgment to that effect, he made a report allowing the intestate to amend, subject to the approval of the court, and ordered a conditional judgment in his favor. This report was set aside by the general term, and the case sent back to the referee for an unconditional determination. The parties having appeared before the referee, he allowed the plaintiff to amend the complaint so as to base his action on mistake instead of on fraud, received such evidence as was offered, and ordered a judgment in the plaintiff's favor: *Held*, that the referee had power to allow the plaintiff to amend the complaint, and that he did not err in allowing the amendment to be made under the circumstances of this case. That the legal effect of the transaction upon which the action was brought, so far as the rights of the parties in respect to a rescission of the contract were concerned, was precisely the same, whether the defendant's misrepresentations were made honestly or dishonestly. That the failure of the plaintiff to explain why he alleged fraud, and omitted to claim relief on the ground of mistake until after his defeat on the issue tendered by him, did not render the allowance of the amendment improper. The old chancery rules requiring such an explanation to be given, have been done away with. (*Knapp* agt. *Fowler*, 30 *Hun*, 512.)

70. Section 1019 — Where a referee has made his report within the statutory time and on the fifty-

ninth day after submission of the cause, notifies the plaintiff's or defendant's attorneys that his report is ready and at their disposal, and also notifies them of the amount of his fees, it should be deemed a sufficient delivery to prevent the forfeiture of his fees or the termination of the reference under this section of the Code of Civil Procedure. (*Thornton* agt. *Thornton*, *ante*, 119.)

71. Section 1021 — Under the Code of Civil Procedure, as under the former Code, a decision of the court overruling or sustaining a demurrer, is an order and not an interlocutory judgment, from which no appeal lies. (*Thompson* agt. *Schieffelin*, *ante*, 235.)

72. Section 1204 — Where, in an action brought by plaintiff for the recovery of damages for the breach of a contract alleged to have been made by eleven defendants contracting jointly, the answer of three of the defendants denies the making of the contract alleged, but avers that the contract, whatever may have been its terms, was with the three defendants, and in respect to that sets up counter-claims:

Held, that such counter-claims are tenable and well pleaded under section 1204, Code of Civil Procedure; that these defendants were not concluded by the allegations of the complaint, but could deny the joint liability, aver a several liability as to themselves, and then set up their counter-claims; that the issue as to whether the contract was with all the defendants sued, or those who set up the counter-claims only, is an issue to be determined on the trial of the case, and if it should turn out to be correct, as the answer avers, the counter-claims would be legally applicable to any claim which might exist in favor of the plaintiff under the agreement or agreements (*Affirming S. C.*, 60 *How.*, 498). (*Clegg* agt. *Cramer*, *ante*, 411.)

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73. Sections 1228, 1229 — Where an action for a divorce, in which issues have been joined, is by consent of the parties referred, the reference should be to hear and decide the issues and not merely to take evidence and report the same with the referee's opinion. Although where the issues in an action are sent to a referee for trial it is better to have the order direct him "to hear and decide," or "to hear and determine" the same, it is not necessary that these words should be used. An order directing "that this action be and the same is hereby referred to * * * to hear the same, and all the issues therein and to report to this court," is sufficient. *Quære*, as to what is the extent of the power given to the court by section 1229 of the Code of Civil Procedure, where judgment in an action for divorce is applied for upon the report of the referee and the testimony taken upon the trial. (*McCleary* agt. *McCleary*, 30 *Hun*, 154.)
74. Section 1278 — Where the holder of a joint promissory note, prior to this section of the Code of Civil Procedure, took judgment by confession for the whole amount against one of the makers: *Held*, that the liability of the other makers was discharged by the judgment; the note as to all having been merged therein. (*Candee* agt. *Smith*, 93 *N. Y.*, 349.)
75. Section 1279 — To give the court cognizance of a case submitted under the provision of this section of the Code of Civil Procedure, providing for the submission of controversies upon facts admitted, the facts stated must show that there was, at the time the submission was made, a controversy or question of difference between the parties on the point presented for decision, and that a judgment can be rendered thereon; the court may not pass upon a mere abstract question. (*People* agt. *Mut. E. & Ac. Ass'n*, 92 *N. Y.*, 623.)
76. Section 1281 — Where in a controversy sought to be submitted between the State and a corporation the only relief to which the former is entitled, if any, is to restrain the corporation from exercising franchises unlawfully, the proceeding should be dismissed, as that relief may not be given therein. (*People* agt. *Mut. E. & Ac. Ass'n*, 92 *N. Y.*, 622.)
77. Sections 1327, 1334 — Where a person signs an undertaking given on appeal in an action as surety, with the express understanding that it was to be executed also by another surety, and the law requires two sureties to an undertaking that would operate as a stay, such surety is not liable on the undertaking if it be filed without a second surety being obtained. (*Grimwood* agt. *Wilson et al.*, ante, 283.)
78. Section 1335 — After two sureties, A. and B., had executed a joint and several undertaking under sections 334 and 338 of the old Code for a stay of proceedings on appeal, A. justified, but when subsequently B. was examined, the justice before whom the examination took place filed a memorandum that he was not qualified and that defendant in the action must produce another surety. Meantime, intermediate the filing of the memorandum and the entry of an order thereon, the defendant executed the undertakings upon which this action was brought, which were approved: *Held*, that by the memorandum and order referred to, the justice approved of A. as one of the sureties upon the undertakings; that it was not necessary that A. should join in the execution of the undertakings with defendant, and even if A. is not liable upon his undertaking for want of a formal indorsement of approval

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- upon it, the defendant shall not be relieved from liability on his undertakings, which stayed plaintiff's proceedings. (*Hooker* agt. *Townsend*, ante, 349.)
79. Section 1381—Upon an application for leave to issue an execution upon a judgment recovered against a person, since deceased, made under this section of the Code of Civil Procedure, an affidavit was presented, made by one of the two plaintiffs in the judgment, in which, after stating that the judgment was recovered by him and his co-plaintiff, he said "that said judgment is wholly unsatisfied and unpaid is valid and subsisting:" *Held*, that the affidavit was sufficient to justify the court in granting the application. It is not necessary that the moving papers should contain a description of all the judgment debtor's lands; and where certain of his real estate is described therein, it is no defense to show that the debtor had other lands not included therein. (*Wadley* agt. *Davis*, 30 *Hun*, 570.)
80. Section 1391—Under an execution issued upon a judgment a constable levied upon a span of mules owned and used by the debtor in his business of farming and boating. He was a householder and had no other team. It did not appear what other property he then had. He did not at the time the levy was made, or at any other time, claim that the mules were exempt: *Held*, that he thereby waived any exemption to which he might have been entitled under this section of the Code of Civil Procedure. (*Russell* agt. *Dean*, 30 *Hun*, 242.)
81. Sections 1421-1425—The provisions of sections 1421 to 1425, authorizing the substitution of sureties to the relief of the sheriff, sued for wrongful levy or attachment, are unconstitutional and void. (*Hein* agt. *Davidson*, ante, 351.)
82. Section 1533—An action for partition cannot, under this section of the Code, be maintained except only where actual partition of the property itself can properly be made; and where it appears that such partition could not be made without great prejudice to the owners, the court has no jurisdiction except to give judgment dismissing the complaint. (*Schew* agt. *Lehning et al.*, ante, 231.)
83. Section 1533—Persons holding as joint tenants or tenants in common, a vested remainder or reversion in real property, can only maintain an action for its partition, during the continuance of the prior estate therein, in the particular cases specified in this section of the Code of Civil Procedure. (*Hughes* agt. *Hughes*, 30 *Hun*, 349.)
84. Section 1536—The bond of a guardian *ad litem* of an infant defendant in partition may be made direct to the infant instead of to the people of the state, provided the order appointing the guardian so direct. (*Thistle et al.* agt. *Thistle et al.*, ante, 472.)
85. Section 1638—Where in an action brought under this section of the Code of Civil Procedure to compel the determination of a claim made by the defendant to real estate, which is and has been for the term of three years in the actual possession of the plaintiff or his grantor, it is shown that there is danger that the possession of the plaintiff will be unlawfully disturbed or molested during the progress of the action, an injunction restraining the defendant from so interfering with the plaintiff's possession may be issued under section 603 of the Code of Civil Procedure. (*Stamm* agt. *Bostrick*, 30 *Hun*, 70.)

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86. Sections 1768, 1769—Title 1, chapter 15 of the Code of Civil Procedure, does not change articles 1, 2, 3, 4 and 5 of title 1, chapter 8, part 2 of the Revised Statutes, and as alimony and counsel fees were allowed in an action to annul a marriage while those portions of the Revised Statutes were in force, that power still continues under the Code of Civil Procedure (*Henkel* agt. *Henkel*, *special term decision of this court*, *INGRAHAM, J.*, decided in November, 1883, not followed; *Sullivan* agt. *Sullivan*, *special term decision of this court*, *O'GORMAN, J.*, decided in October, 1883, followed). (*Lee* agt. *Lee*, ante, 207.)

37. Section 1776—Where a complaint alleges that plaintiff is a corporation organized under a law of this state, and the answer simply avers that defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation, plaintiff is not required to prove the corporate existence; such an averment is not equivalent to an "affirmative allegation" that plaintiff is not a corporation, which is requisite to impose upon it the burden of proof (*Chap. 508, Laws of 1875*). (*Concordia Savings and Aid Ass'n* agt. *Read*, 93 N. Y., 474.)

88. Sections 1784, 1788, 1793—A receivership in a creditor's suit to sequester the property of a railroad company comes within the spirit and intent of the law of 1883; requiring notice to be given to the attorney general of all proceedings in an action for the dissolution of a corporation or a distribution of its assets; and such receiver cannot be legally appointed without compliance with this provision. A receiver, in an action to foreclose a mortgage executed by the company, has the right to apply to be relieved from the void order or judgment, if it injuriously affects him in the discharge of his duties, although he has not in

any form been made a party to the creditors' action.

Subsequent proceedings to subject the attorney general to the order and judgment appointing and continuing the receiver in the creditors' action without notice to the receiver in the foreclosure action, whose motion to vacate such order and judgment had been heard and submitted, were very improper and they had no practical effect in the case.

The order appointing the receiver in the creditors' action should, in an event, be so limited as to restrict his receivership to the property, contracts and effects of the company, not included in nor incumbered by the mortgage, which is unassailed.

It is not necessary to give notice to the attorney general, in an application for the appointment of a receiver in a suit, to foreclose a corporate mortgage. (*Whitney* agt. *The N. Y. and Atlantic Railroad Co.*, ante, 436.)

89. Section 1836—In an action brought and a recovery had against an executor to justify the imposition of costs against such executor it must appear that the claim was presented to the executor after he had qualified and entered upon the discharge of his duties, and that after such presentation and before suit he refused to refer it as prescribed by law, or that he unreasonably resisted or neglected its payment.

A motion for costs will be denied where there is no legal proof of the presentation of the claim sued on, after the granting of letters of administration to the executor, and of its rejection by him.

It is not an "unreasonable resistance of a claim" which was barred by the statute of limitations, unless there had been a payment thereon by the deceased, whose estate the executor represented and of which he had no personal knowledge, to require the proof

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- thereof to be submitted to a court in an action in which he voluntarily appeared in order that no charge of want of fidelity to the estate could be made. (*Chesebro agt. Hicks, ante, 194.*)
90. Section 1913—The filing and docketing of a transcript of a justice's judgment in the county clerk's office makes it the judgment of the county court; and no action can thereafter be brought upon it in a justice's court, as it is required by this section of the Code of Civil Procedure that the order granting leave to bring such an action shall be made by the court in which such action is to be brought, and that court has no power to grant leave to bring an action upon a judgment of a county court. (*Baldwin agt. Roberts, 30 Hun, 163.*)
91. Section 1937—An action may be brought under this section of the Code of Civil Procedure after the recovery of a judgment against joint debtors, by the judgment creditor "against one or more of the defendants who were not summoned in the original action," although the defendants served have appealed and have given the security, which under said Code (*sec. 1310*), "stays all proceedings to enforce the judgment appealed from."
- The second action is not brought to enforce the judgment but to establish the liability of the defendants not served, which is not determined by such judgment. (*Morey agt. Tracy, 92 N. Y., 582.*)
92. Section 1953—In this action brought to determine the title to the office of mayor of the city of Albany, a verdict was rendered in favor of the relator and a judgment entered declaring him entitled to the office. Thereafter, upon the application of the relator, an order was made allowing him to file and serve a "suggestion or statement, or supplemental complaint," alleging that he had sustained damages to the amount of \$4,005.43 by reason of the defendant's having drawn the salary of the office up to the time of the entry of the judgment; and requiring the defendant within twenty days from the service of a copy of the said suggestion or statement, or supplemental complaint, upon his attorney, to file his answer thereto duly verified: *Held*, that as under this section of the Code of Civil Procedure, the relator is entitled to recover his damages in the same action in which his title to the office is established, and as the claim for damages cannot be set forth in the original complaint, but must be alleged in some manner after the judgment upon the right to the office has been rendered, the order was properly granted, except in so far as it compelled the defendant to answer the suggestion under oath. That this provision should be stricken out of the order, and that as so modified it should be affirmed. (*People ex rel. Scribner agt. Nolan, 30 Hun, 434.*)
93. Section 2007—Where a judgment of a court-martial is brought into the supreme court by a writ of *certiorari* and there reversed, the respondent is personally liable for the costs awarded by the final order, and may be adjudged guilty of a contempt if he fail to pay them after a demand therefor has been duly made. (*Matter of Leary, 30 Hun, 394.*)
94. Section 2066—A proceeding may be brought in this court by or against the executor or administrator of decedent A., who was himself the executor or administrator of decedent B., for an accounting with respect to decedent A.'s estate. The parties interested in the estate of decedent B. will be entitled upon such accounting to assert, in common with the other creditors of A., such claims

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as they may have against his estate on account of any liability he may have incurred by reason of his administration of B.'s estate.

But there is no provision of law which authorizes the representatives of a deceased executor or administrator to initiate and conduct a proceeding for the accounting of their decedent in the estate whereof he was himself executor. (*Matter of Raney, ante, 291.*)

95. Section 2117, 2118 — Under these sections of the Code of Civil Procedure, a surrogate has no jurisdiction to entertain proceedings instituted by one claiming a legacy, to compel an executor to pay the same, when the executor "files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity." In such a case, the surrogate must dismiss the petition.

The objection, although not raised in the surrogate's court or at general term, may be taken on appeal to this court. (*Fiestier agt. Shepard, 92 N. Y., 251.*)

96. Section 2140 — This section is not applicable to proceedings commenced prior to September 1, 1880. (*Phyfe agt. Manhattan Railway Co., 30 Hun, 377.*)

97. Section 2140 — The provisions of chapter 16 of the Code of Civil Procedure in reference to appeals, do not apply to an appeal in a proceeding by *certiorari* commenced prior to September 1, 1880. (*Code, sec. 3347, subd. 11.*)

It seems, the provisions of said chapter of this section, declaring that in such a proceeding the court, upon "*the hearing*," shall have power to determine whether there was such a preponderance of proof against the existence of any fact found, that the verdict of a jury affirming its existence rendered in an action in the

supreme court, "would be set aside as against the weight of evidence," has no application to appeals to this court. It only applies to the "hearing" on return to the writ, and is confined to the court in which such hearing is had.

It seems, also, that the general statutory scheme for the distribution of judicial powers does not contemplate the review by this court of disputed questions of fact, and it will not entertain such questions in the absence of express legislative authority. (*The People ex rel. Murphy agt. French et al., 92 N. Y., 306.*)

98. Section 2238 — In summary proceedings for holding over after expiration of term, the precept cannot be made returnable the day after it was issued. (*Blake agt. Blake, 30 Hun, 468.*)

99. Section 2366 — The mere submission of a cause to arbitration, the arbitrators never taking or consenting to take upon themselves the burden of the submission, operates as a discontinuance of a suit pending in court between the parties. (*McNulty agt. Solley, ante, 147.*)

100. Sections 2447, 2463 — A judgment debtor who has been served with an order for appearance and examination in proceedings supplementary to execution, which forbids him from transferring any of his property until further directions, is not guilty of contempt in applying his earnings for services rendered within sixty days of the commencement of the proceedings to the support of his family.

The Code of Civil Procedure does not authorize any interference with such earnings (*sec. 2463*), and it is not necessary for the debtor to procure permission of the court or judge before making the application.

The provision of said Code requiring that the facts constituting the exemption shall be made to

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appear by the oath of the debtor or otherwise is answered by putting upon the debtor the burden of justifying the use of his earnings when called upon to transfer the money to the sheriff or a receiver (*Sec. 2447*). (*Newell* agt. *Cutler*, 19 *Hun*, 74, *overruled*.) (*Hancock* agt. *Sears*, 93 *N. Y.*, 79.)

101. Section 2456—Where, in pursuance of the power conferred upon him by this section of the Code of Civil Procedure, a surrogate appoints a referee to examine an account rendered, and to hear and determine all questions arising upon the settlement thereof, which he himself had power to determine, and to make a report thereon, subject to confirmation by the surrogate, the rules of the supreme court are, by section 17 of the said Code, made applicable to such a reference and the report of the referee becomes absolute, and stands as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the report. Where no exceptions have been taken and filed, the surrogate has no alternative but to confirm the report. (*Matter of Leffingwell*, 30 *Hun*, 528.)

102. Section 2496—A surrogate is not disqualified from acting by reason of his having been attorney for the testator at the time of his death—he is not disqualified because he may be called as a witness by the contestants. (*People* agt. *Weiant*, 30 *Hun*, 475.)

103. Section 2545—In proceedings before a surrogate to compel an accounting, by an executor, instituted prior to September 1, 1880, a hearing was had and a decree rendered, after that time, which was appealed from. The appellant, at the close of the evidence, requested the surrogate to find upon certain questions of fact, as provided by this section of the

Code of Civil Procedure, which he refused: *Held*, that an exception to the refusal was not well taken; as, by the said Code (*sec. 3347, subd. 11*), all proceedings pending in surrogate's court on that date are exempted from the operation of any of the provisions of the chapter (18) containing said provision. (*Mills* agt. *Hoffman*, 92 *N. Y.*, 181.)

104. Sections 2739, 2740—After the death of the defendant's testator, one of the defendants, a son and one of the executors of the testator, assigned to the plaintiff, his wife, through a third person, all claims and demands which he had against the testator, or his estate, for services rendered, under a written agreement entered into between him and the testator in the lifetime of the latter in supplying the testator with necessities, and taking care of, and nursing him: *Held*, that the plaintiff could not maintain an action in the supreme court, against the executor, to recover the amount due under this agreement; but that the claim should be presented to the surrogate for allowance as provided by these sections of the Code of Civil Procedure. (*Snyder* agt. *Snyder*, 30 *Hun*, 186.)

105. Sections 2756, 2757—During the pendency of an action against an executor for misappropriation of moneys belonging to the estate, he died and his executor was substituted as party defendant. Judgment was recovered, which the defendant was directed to pay out of the estate; costs were also given, which were directed to be paid in like manner. The real estate of the deceased executor was sold by order of the surrogate: *Held*, that in the distribution of the proceeds said judgment creditor was not entitled to a preference for the damages recovered over the other creditors of the decedent, but was entitled to share *pro rata*;

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and that the surrogate properly disallowed the costs, as a claim, payable out of such proceeds. (*In Matter of Fox*, 92 N. Y., 93.)

106. Sections 2877, 2901, 2902—

Where an action for a wrongful injury to personal property is commenced in a justice's court by the service of a summons returnable forthwith, accompanied by an order of arrest, the jurisdiction of the justice does not depend upon the sufficiency of the affidavit upon which the order of arrest was made, but upon the service of the summons, and it still remains though the order be set aside as improperly granted. (*McNeary* agt. *Chase*, 30 Hun, 491.)

107. Section 2957—The provision of the Code of Civil Procedure providing that where a new action is brought in a court of record after the discontinuance of an action before a justice of the peace, because of a plea of title, the complaint must be for the same cause of action only as that relied upon before the justice, does not prohibit the plaintiff from making such cause of action perfect by inserting in the complaint new allegations necessary for that purpose.

Where, therefore, the action in the justice's court was against a corporation, but the complaint therein contained no allegation that defendant was a corporation: *Held*, that the insertion of such an allegation in the complaint in the new action brought in the supreme court was proper. (*Fox* agt. *The Erie Preserving Company*, 93 N. Y., 54.)

108. Section 3068—It is not in every case where the defendant demands in his answer judgment in his favor exceeding fifty dollars that he, as appellant may demand and have a new trial in the appellate court, but only in those cases where, from the nature of the action and the condition of the

pleading, it can be seen that the demand has some basis in fact or law in its support.

An improper pleading cannot be made the basis of a demand for a new trial in the county court, under the Code, applicable to appeals from judgments rendered by justices of the peace.

Where an action was brought in a justice's court in trover for taking and converting a cow, and damages were claimed in the sum of fifty dollars, the defendant answered by general denial, also set up property in himself, demanded judgment for the dismissal of the complaint and for seventy-five dollars damages, &c. Judgment was rendered in favor of plaintiffs for forty-four dollars and twelve cents. The defendant in his notice of appeal to the county court demanded a new trial in that court. The justice's return having been filed, the plaintiffs moved thereon for an order transferring the case to the law calendar, and that it be heard on the justice's return without a new trial therein, which motion was denied:

Held, that the practice was correct. It was proper to determine in advance whether the appeal was to be tried on a question of fact or one of law. The county court had jurisdiction to determine that question, and it could do it as well on special motion as at opening of trial. (*Harvey* agt. *Van Dyke*, ante, 396.)

109. Section 3223—This section of the Code of Civil Procedure "embraces the entire subject of jurisdiction as regards that court, and was plainly intended so to do. Not purporting to amend any former or existing laws in that particular, they are repealed by necessary implication."

Under its provisions in relation to the "justices' court of the city of Albany," * * * providing that it shall have jurisdiction "within the city where the court is

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located," the jurisdiction thereof is restricted to the city limits.

Accordingly *held*, that said court had no power to send process into adjoining towns for service, and that it acquired no jurisdiction by the service of a summons *outside* of the city (*Geraty* agt. *Reid*, 78 *N. Y.*, 64, *followed*). (*Conor* agt. *Hilton*, *ante*, 144.)

110. Section 3228—When a claim of title to real property arises upon the pleadings so as to entitle plaintiff to costs. (*Green* agt. *Village of Canandaigua*, 30 *Hun*, 306.)

111. Sections 3228, 3238—Where a plaintiff is entitled to costs, under these sections of the Code of Civil Procedure, upon entry of judgment in his favor, and such judgment is reversed and new trial granted by the general term "with costs to appellant to abide the event," but is affirmed on appeal by plaintiff to this court, he is entitled, of course, to the costs of the appeals to the general term and to this court. (*Murtha* agt. *Curley*, 92 *N. Y.*, 359.)

112. Section 3234—In this action, brought to recover penalties for violations of the acts to prevent the adulteration and dilution of milk, the complaint set forth separately twenty-three causes of action. The answer was a general denial. Upon the trial the plaintiff, having given evidence tending to establish thirteen of the causes of action, recovered a verdict "for two counts at fifty dollars each, amounting to one hundred dollars." The defendant claimed to be entitled to tax costs in his favor under this section of the Code of Civil Procedure, providing that where the complaint sets forth separately two or more causes of action upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the others, each

party is entitled to costs against the adverse party: *Held*, that the claim was not well founded, as the defendant had not recovered upon any of the issues within the meaning of the said section. (*Cooper* agt. *Jolly*, 30 *Hun*, 220.)

113. Section 3251—Upon an appeal from the city court, general term, to the common pleas, full costs follow, whether the appeal be from an order or a judgment and whether the appeal be dismissed or disposed of on the merits. (*Goodridge* agt. *Connor*, *ante*, 143.)

114. Section 3253—In a difficult and extraordinary case, where the defendant interposes to plaintiff's claim as a defense and by way of a set-off two promissory notes, and upon the trial judgment is rendered for plaintiff upon all the issues involved and for the full amount claimed, the plaintiff is entitled to an extra allowance, not only upon the sum recovered in the action, but upon the basis of the defendant's set-off determined against him. (*Barclay* agt. *Culver*, *ante*, 342.)

115. Section 3253—A demurrer is a defense within the meaning of this section so as to entitle a party to an additional allowance. (*Noyes* agt. *Wyckoff*, 30 *Hun*, 466.)

116. Section 3253—A railroad company was authorized to construct its road along an abandoned canal from Rochester to Cuba. To avoid a heavy grade it proposed to leave the line of the canal near the village of Nunda, pass to the west of it and again strike the line of the canal. An action, brought by the people to have the road enjoined from leaving the line of the canal and to compel it to construct its road along the line thereof, was decided in favor of the defendant. Upon an application by the defendant for an extra allowance, affidavits were

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read tending to show that the new route could be much more cheaply constructed and operated by the company than could the old one: *Held*, that the court properly denied the application upon the ground that the value of the subject-matter involved, upon which the allowance must be based, was not shown by the affidavits. (*People agt. Genesee Valley Canal R. R. Co.*, 30 *Hun*, 565.)

117. Section 3253—The provision of this section of the Code of Civil Procedure, in reference to extra allowances of costs, simply authorizes such an allowance in an action wherein rights of property are involved and a pecuniary value may be predicated of the subject-matter; the importance of a litigation in any other than its pecuniary aspect affords no basis for the allowance, and when no money judgment is asked or rendered and the "subject-matter involved" is not capable of a money value, or the value is not shown, the allowance is not authorized.

The term "subject-matter involved" refers simply to property or other valuable thing, the possession, ownership or title to which is to be determined by the action, it does not include other property although it may be directly or remotely affected by the result. (*Conaughty agt. The Saratoga Bank*, 92 *N. Y.*, 401.)

118. Section 3258, 3229 — Where, in an action brought against a sheriff to recover a sum of money or a chattel, by reason of some act done by him by virtue of his office, a final judgment is rendered in his favor, he has an absolute right to the additional costs given by this section of the Code of Civil Procedure. He has the same right to the increased costs as to the single costs given by section 3229. (*Smith agt. Cooper*, 30 *Hun*, 395.)

119. Section 3258—Where, in an action brought against a sheriff to recover a sum of money or a chattel, by reason of some act done by him by virtue of his office, a final judgment is rendered in his favor, he has an absolute right to the additional costs given by this section of the Code of Civil Procedure. He has the same right to the increased costs as to the single costs given by section 3229. (*Smith agt. Cooper*, 30 *Hun*, 395.)

120. Sections 3271, 3246—Under the provisions of these sections of the Code of Civil Procedure, giving to the court discretionary power to require the plaintiff in an action brought by or against an executor, administrator, etc., in his representative capacity, to give security for costs, the court has power to require such security of one bringing suit in such capacity, although there is no evidence of mismanagement or bad faith, and aside from the question of his personal liability for costs as prescribed by the Code. (*Tolman agt. S., B. & N. Y. R. R. Co.*, 92 *N. Y.*, 353.)

121. Section 3301—The provision of this section of the Code of Civil Procedure (*as amended by chap. 399, Laws of 1882*), providing that the stipulation of the attorneys for parties to an action may take the place of a clerk's certificate to a copy of a paper whereof a certified copy is required, was not intended to alter the effect of the provision (*sec. 1315*) requiring a return to this court to be certified by the clerk of the court from which the appeal is taken, or of the rule of this court (*Rule 1*) making the same requirement.

Returns to this court should be made by a responsible officer, under sanction of his official oath, and attorneys for parties cannot, by stipulation, make up a case for the court. (*Dow et al. agt. Darrough*, 92 *N. Y.*, 537.)

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CODE OF CRIMINAL PROCEDURE.

1. Sections 56, 444, 445 — Where a prisoner has been indicted for grand larceny, and is on trial before a jury in the court of oyer and terminer, or of the sessions, they have the power to find a verdict of petit larceny. (*The People* agt. *McTameney*, ante, 70.)
2. Section 238 — Practice as to drawing grand jurors — person charged with crime cannot object to grand jury that they are drawn under an unconstitutional law — there is no way provided by Code of Criminal Procedure for such objection. (*The People* agt. *Fitzpatrick*, ante, 14.)
3. Section 293 — This section of the Code of Criminal Procedure authorizing the court upon the trial to amend an indictment where a variance between the allegation therein and the proof in respect to time, or in the name or description of any place, person or thing, shall appear, if the defendant cannot be thereby prejudiced in his defense on the merits, does not authorize the court to amend an indictment for grand larceny, charging the taking of a ring of the value of eight dollars, and certain gold and silver coin of the value of eighty dollars, by substituting for the allegation as to the taking of the gold and silver coin, others charging the taking of "bank bills," lawful money of the United States, of a kind, number and denomination unknown, and upon banks unknown, of the value of forty-five dollars, a more particular description of which cannot be given. (*People* agt. *Poucher*, 30 *Hun*, 576.)
4. Section 376 — Upon the trial of an indictment for murder, a juror, challenged by the prisoner for principal cause, testified in substance, that he had read and talked about the case, and had formed an opinion as to the guilt or innocence of the prisoner, but that such opinion would not, as he believed influence his verdict, and that he could render an impartial verdict: *Held*, that the challenge was properly overruled. (*The People* agt. *Cornetti*, 92 *N. Y.*, 85.)
5. Section 518 — Formerly the people had no right or power to review a decision or judgment favorable to a prisoner. The right to do so depends upon statute. Upon this section of the Code of Criminal Procedure an appeal to the supreme court can be taken by the people in two cases only: 1st. From a judgment for the prisoner on a demurrer to the indictment. 2d. From an order of the court arresting judgment.
An order of the oyer and terminer setting aside a grand jury and quashing an indictment, is not reviewable in the supreme court.
The general term of the supreme court can correct errors and mistakes in criminal cases only when brought before it pursuant to statute. (*The People* agt. *Dempsey*, ante, 372.)
6. Section 427 — Where a jury, after it has retired to deliberate upon its verdict, returns into court and asks for further instructions, the prisoner has, under this section of the Code of Criminal Procedure, an absolute right to have his counsel notified of the fact, and it is a fatal error for the court to give further instructions to the jury before giving such notice to the counsel, even though the prisoner himself be present in court and takes no exception to the instruction so given. (*People* agt. *Cassiano*, 30 *Hun*, 388.)
7. Sections 465, 466, 517 — Practice — on a motion for a new trial made under these sections in a capital case upon the ground of newly discovered evidence, what

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must be shown to justify the court in making the order. Appealability of such order to the general term. (*People* agt. *Hovey*, 30 *Hun*, 354.)

8. Sections 527, 519 — The provision of these sections of the Code of Criminal Procedure providing that "the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence, * * * or that justice requires," is applicable only to the supreme court, and gives that court a discretionary power. When in the exercise of that discretion it refuses or grants a new trial its determination is not reviewable here.

Under the provision of said Code authorizing an appeal to this court by the people from a judgment of the general term reversing a judgment of conviction, such an appeal brings up for review only questions of law. (*The People* agt. *Boas*, 92 *N. Y.*, 560.)

9. Section 527 — The provision of this section of the Code of Civil Procedure, as amended in 1882 (*chap.* 366, *Laws* of 1882), providing that "the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice required a new trial whether any exceptions shall have been taken or not," applies only to appeals to the supreme court. (*The People* agt. *Hovey*, 92 *N. Y.*, 554.)

10. Section 887 — Where warrants were granted by a police justice committing two children under fourteen years old as being vagrants, namely, "engaged in the occupation of begging under the pretext of peddling, to wit, Bowery, in said city, at ten forty-five P. M. on the 5th day of April, 1883, and frequenting the company of prostitutes, concert

saloons, dance-houses and places of entertainment where spirituous liquors were sold," upon an affidavit made at the hearing before the magistrate stating the ages of the children, respectively, eleven and thirteen, and that they were found by the affiant committing acts of alleged vagrancy, described substantially in the same language as that used in the warrants, and the children were afterwards discharged upon *habeas corpus*:

Held, that the return of the commitment in answer to the *habeas corpus*, and the admission of the facts it contained by the failure to take issue thereon, presented a case, under section 291 of the Penal Code, upon which the court should have remanded the children.

The purpose of the writ of *habeas corpus* is not to review trials before a magistrate on questions of vagrancy. (*Matter of Moses*, *ante*, 296.)

11. Section 892 — This section of the Code of Criminal Procedure has been repealed or abrogated by the provisions of the consolidation act (*Laws* of 1882, *chap.* 410), and the filing of the record of conviction of a prisoner on a charge of being a vagrant, by a police justice in the office of the clerk of the general sessions of the peace is regular. (*Matter of Waters*, *ante*, 173.)

COMPLAINT.

1. Where a complaint prays only for an injunction against a defendant disposing of its property, that property being in the hands of a receiver, it cannot be sustained. (*Panecost* agt. *American Heating and Power Company*, *ante*, 4.)
2. In an action by the creditors of a corporation against the directors thereof to hold them personally liable, because the debts of the corporation created by defendants exceed the amount of its capital

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stock, it is enough to state the amount of such capital and to give the amounts of the claims which are outstanding, and it is not necessary that the debts should be due. If an apparent claim is not real, the fact should be set up by answer. (*Robinson* agt. *Attrill*, *ante*, 121.)

3. The board of commissioners of the department of public parks, being only a subordinate division of the city government, are not liable to be sued as a corporate entity. (*Rauh* agt. *Board of Commissioners of the Department of Public Parks*, *ante*, 368.)

4. In an action against such commissioners a demurrer to the complaint should be sustained, notwithstanding an allegation that they are a domestic corporation. (*Id.*)

5. Such allegation not being of a matter of fact, but a conclusion of law, the court will judicially take notice of the fact that the defendants constitute a part of the municipal government of this city and that their powers are defined and limited by the charter of the city and other public statutes in relation to that subject. (*Id.*)

6. Where, in an action to recover penalties for violation of the excise laws, the complaint charged that the plaintiffs were overseers of the poor, &c., and that the defendant was, on the 12th day of May, 1883, keeper and proprietor of a hotel known as the "Mansion House," in the town named, and on that day, in said hotel, in violation of the provisions of chapter 628 of the Laws of 1857, and the statutes amendatory thereof, he "sold strong and spirituous liquors and wines in quantities of less than five gallons at a time, viz., one gill of brandy, one gill of whisky, one gill of gin, one gill of wine, one gill of alcohol, one gill

of rum, one gill of ale, one gill of beer, without having a license therefor granted according to the provisions of said statutes, whereby defendant became indebted and liable to plaintiffs in the sum of fifty dollars forfeiture and penalty imposed by said statutes." On motion to make the complaint more definite and certain, or for a bill of particulars:

Held, that the complaint is framed under and according to the rules and requirements of the common law, and is sufficient, as against the objection, that the reference to the law under which this action is brought is indefinite and uncertain. As a common-law pleading it is sufficient that the complaint charges in due form and sufficient particularity the commission of the offense declared by the statute, with general reference to the law giving the right of action for the penalty. (*Kee et al.* agt. *McSweeney*, *ante*, 447.)

7. An indorsement on the summons referring to the statute is not necessary where service of a copy of the complaint accompanies it:

Held, further, that the plaintiffs should either make the complaint more definite and certain by amendment, stating the name and names of the person to whom the sales charged therein were made, or serve on defendant's attorney a bill of particulars giving such information, or in case of inability to give name and names of such persons, then by stating grounds for the omission. (*Id.*)

8. The plaintiff, as administratrix, sued to recover \$3,500, claimed to have been wrongfully received by defendant as interest upon the foreclosure of a \$25,000 mortgage executed by the intestate, said sum being alleged to have been already paid to defendant for interest on said mortgage by the intestate in his lifetime. The complaint alleged that judgment of foreclosure and sale was duly

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entered and the premises afterwards duly sold by a referee duly appointed:

Held, that it follows from the allegations of the complaint, that in all these proceedings on foreclosure, the plaintiff's intestate had notice and that the amount to which the defendant in this action and the plaintiff in the foreclosure action was entitled for principal and interest was directly in issue; and the defendant is entitled to judgment on demurrer to the complaint. (*Bearnes agt. Bearnes, ante, 456.*)

See TRUSTEES.

Taylor agt. Thompson, ante, 102.

CONFESSION OF JUDGMENT.

1. Where the holder of a joint promissory note, prior to the Code of Civil Procedure (*sec. 1278*), took judgment by confession for the whole amount against one of the makers: *Held*, that the liability of the other makers was discharged by the judgment; the note as to all having been merged therein. (*Candee agt. Smith, 93 N. Y., 349.*)

CONSTITUTIONAL LAW.

1. Justices of the peace are "justices or judges of any court" within the meaning of section 13, article 6 of the constitution. Persons over seventy years of age are ineligible to office. Writ of prohibition is the proper remedy against a person acting as justice of the peace who is over seventy years of age. (*The People ex rel. Lawrence agt. Mann et al., ante, 337.*)
2. On a motion to vacate and set aside several orders and proceedings thereunder or subsequent thereto, which had for their object the carrying into effect the various statutes in relation to the improvement of the Harlem river and Spuyten Duyvil creek, on the

ground that chapter 147 of the Laws of 1876, chapter 345 of the Laws of 1879, chapter 65 of the Laws of 1880, chapter 61 of the Laws of 1881, chapter 387 of the Laws of 1882, chapter 410 of the Laws of 1883 and chapter 214 of the Laws of 1883 are, and each of them is, unconstitutional and void, as being in contravention of section 6 of article 1, and also of section 11 of article 8 of the constitution of the state of New York:

Held, first, that the purposes to which the land sought to be taken in these proceedings are to be devoted are public within the meaning of our constitution. The use being in its nature public, the legislature are the sole judges of the question whether the benefit to our citizens or to the state is such as to warrant the taking of private property therefor, and are also the sole judges of the question of the supervision or control over the use which should be retained in order to secure the contemplated public benefits.

Second. A court at special term should not declare an act to be in conflict with the provisions of the Constitution of the United States or of the state, unless its conflict with those provisions is clearly apparent.

Third. That the acts are not unconstitutional in that private property condemned is not taken for a public use within the meaning of the constitution.

Fourth. That a sure pledge is given to the owners of lands taken that they shall be paid before possession of the lands is taken under the acts, and the act is not subject to the criticism that a first, sure and certain compensation is not secured to said owners for the value of their property.

Fifth. Nor can it be said that the lands in question are proposed to be taken without due process of law. If the acts are valid, the taking is by due process of law.

Sixth. Nor are the proceedings invalid because they were not in-

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stituted by the United States district attorney for this district.

Seventh. That the widening, deepening and improvement of the Harlem river, as contemplated by the acts, is a city purpose. The improvement, if carried out, will develop that portion of the city which fronts upon the Harlem river, and will bring into closer communication the parts of the city which lie upon either side of the river, which river now runs exclusively within the city limits.

Eighth. That if the acts of the legislature are constitutional in other respects a private individual cannot raise the objection that the lands of the city have been illegally given away.

Ninth. That the objections to the acts cannot be sustained on the ground that the assessments take from the party assessed private property for the public use. The legislature has power to take lands under eminent domain and to pay for them by assessments on the land benefited thereby.

Tenth. That the constitution does not require that the title of an act should specify all of its provisions. In this case the general subject is expressed in the title, which is the single one of acquiring the right of way, and what is necessarily incidental to it for the improvement of the Harlem river, and although there are changes in the details for carrying out the scheme of the improvement, the general subject of all the acts remains the same. (*Matter of United States, ante, 517.*)

CONTEMPT.

1. A defendant who while seeking release upon *habeas corpus* from imprisonment under a commitment for violation of an injunction on the ground of insufficiency of the commitment itself, is not entitled to be released from a further commitment, immediately succeeding his discharge, for the reason that he was privileged as a

party in attendance upon the other proceedings. (*Murad agt. Thomas, ante, 100.*)

2. The senate of the state of New York directed its standing committee of cities to investigate the Department of Public Works in the city of New York, and ascertain whether or not certain "grave charges of fraud and irregularities" made by the "public press" and by the "Union League Club of the city of New York," against Hubert O. Thompson, the head of such department, were true; such committee was empowered to "send for persons and papers," and was directed "to report the result of such investigation and its recommendations concerning the same to the senate, on or before the 15th day of April, 1884." The senate had no *judicial* control of the officer whose conduct was to be investigated, but could initiate *legislation* to prevent abuses in such department, and to remove its head. One William McDonald had been summoned as a witness before the senate committee, and had refused to answer questions concerning materials furnished to such department, and other questions touching his business as a dealer in coal, and had left the presence of such committee, and declined to be further examined. For such conduct McDonald had been adjudged by the senate to be in contempt, and had been sentenced to imprisonment in the common jail of Albany county, "until the final adjournment of the present legislature, unless sooner discharged by order of the senate." On an application for his discharge from such imprisonment by *habeas corpus*, returnable at the Albanyoyer and terminer, then in session, it was *Held, first.* The resolution of the senate should be construed as authorizing an inquiry for the purpose of *legislation*, and not simply as one to determine the truth of charges made against an official,

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over whom it had no judicial control.

Second. The power to punish for a contempt is a judicial and not a legislative one (*This proposition discussed on principle, and Kilbourn* agt. *Thompson*, 103 U. S., 168, 193; *Kielley* agt. *Carson*, 4 *Moore's P. C.*, 62, 89, 90; *Fenton* agt. *Hampton*, 11 *Moore's P. C.*, 347, 252, etc.; and *Doyle* agt. *Falconer*, 1 *Law Reports, P. C.*, 328, cited as establishing it).

Third. The provisions of the Revised Statutes (1 R. S. [Ed.'s ed.], 153, sec. 13, sub. 4), so far as they authorize the punishment by the legislature, or either house thereof, of an alleged contempt incurred in the prosecution of a purely legislative inquiry, and not in one in which it has judicial functions to discharge (there are judicial duties devolved upon the legislature and each house thereof by the constitution of the state), *believed* to be unconstitutional for two reasons, to wit: 1st. The lodgment of judicial power in a different department is a prohibition against the transfer by the legislature to itself of any such power. 2d. As violating article 1, section 6 of the constitution of the state, declaring "No person shall be * * * deprived of life, liberty or property without due process of law" (*Citing Kilbourn* agt. *Thompson*, 103 U. S., 168, 187; *Taylor* agt. *Porter*, 4 *Hill*, 140-147; *People* agt. *Dwyer*, 15 N. Y., 532, 543, 544; and *Happy* agt. *Mosher*, 48 N. Y., 213.)

Fourth. The power to punish for an alleged contempt incurred in the course of an inquiry, made for the purpose of legislation, is not an inherent one in a legislative body. The dicta to the contrary in elementary text books and judicial opinions, all rest upon *Anderson* agt. *Duncan* (5 *Wheaton*, 204), *Burshett* agt. *Abbott* (14 *East*, 1131), and some of the earlier English cases, all of which are overruled, the first in *Kilbourn* agt. *Thompson* (103 U. S., 168), and the last

in *Kielley* agt. *Carson* (4 *Moore's P. C.*, 62), *Fenton* agt. *Hampton* (11 *Moore's P. C.*, 347), and *Doyle* agt. *Falconer* (1 *Law Rep.*, P. C., 328).

Fifth. The congress of the United States is a legislative body as well as a legislature of the state. Whatever unconferrred powers the latter has as ancillary to its right to legislate, must also be possessed by the former in aid of its legislation upon subjects within its jurisdiction. The case of *Kilbourn* agt. *Thompson* is, therefore, applicable to the present (The alleged inherent power of a legislature to punish for a contempt committed in the progress of an inquiry, purely legislative, considered on reason and authority. *Kilbourn* agt. *Thompson* analyzed, and its effect upon the present case shown).

Sixth. Neither branch of the state legislature, under section 17 of article 1 of our state constitution, obtains the power to punish for contempt in aid of legislation, because: 1st. It was not a part of the "common law" of England, but of the "*Lex et Consuetudo Parliamenti*," and as parliament asserted and was universally conceded, its "power being above the law is not founded upon the common law." 2d. No act of the legislature of the colony of New York ever conferred upon itself any such power. 3d. As the power of parliament was omnipotent, and the power to punish for contempt was never conferred upon the colonial nor the state legislature, it is a legal impossibility that either could succeed thereto as an inheritance, for both took only conferred power. (*These propositions, discussed at considerable length, citing the cases before referred to, and also Bancroft's History of the U. S.*, vol. 2, p. 414; vol. 3, pp. 55, 101; 2 R. L. of 1853, appendix, page 6; 1 *Blackstone's Com.* 160, 161, 163; *Landers* agt. *Woodworth*, 2 *Can. Sup. Ct. Reps.* 158, 1 *Hollan's Com. Res.* 221, 225.)

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Seventh. If the provisions of the Revised Statutes before cited, and which are claimed to confer the power exercised, are unconstitutional, then they were not validated by article 1, section 17 of the constitution because only such statutes as were "*in force*" at the time of the adoption of the constitution are covered by its language. In no proper sense can an unconstitutional law be said to be "*in force*." Neither can a long continued *claim* of power and its *occasional* exercise confer it if illegal. A citizen deprived of liberty can always question the existence of an authority which holds him in custody.

Eighth. The power of the state legislature, and of either house, to punish for a contempt committed during the progress of judicial inquiry which it is authorized to make (in determining the election, etc., of its own members, in investigations with reference to impeachments by the assembly, and various other cases specified in the constitution) are undeniable, but the existence of any such power in aid of *pure legislation* is more than doubtful. While a single judge, holding without associates a court, entertains these views, both on reason and on a careful study of the recent utterances of the supreme court of the United States and of the privy council of England, he should still in judicial *action*, while freely discussing, as it is his duty to do, a question of such vast importance, to the end that it may be rightly settled, not rashly attempt to overturn and disregard the practice of the state for many years, the judicial *dicta* of its judges, and the opinions of elementary writers of acknowledged high authority, upon cases not necessarily controlling in this state. Especially should he not do so when its effect will be, if he is wrong in his views, to improperly arrest an important inquiry which a legislative body, largely composed of eminent

lawyers, supposes it has the power to pursue; and to practically overrule a decision of the general term of this department (*People agt. Learned*, 5 *Hun*, 626), the court immediately above the one which he is holding. As McDonald will be entitled to full redress if his imprisonment be adjudged unlawful, he must be remanded to the custody of the sheriff of Albany county to be held by such sheriff under the senate's commitment, or until a higher court shall, with the additional light before it afforded by the recent decision of the supreme court of the United States reconsider its own conclusion, reached without any discussion by it, probably on the faith of *Anderson agt. Dunn*, and the older English cases.

Ninth. Section 719 of the Penal Code does not apply. That section was intended to define with accuracy when the penalties for crime prescribed by such Code took effect and such penalties relate only to those which are to be pronounced by courts on criminal prosecution instituted to punish crime. It does not interfere with any power elsewhere bestowed to punish summarily for contempt. (*Matter of McDonald*, ante, 489.)

3. Where a corporation has failed and refused to comply with the terms of a judgment recovered against it, the supreme court, at special term, has power to make an order directing a writ of *distringas* to issue, compelling the corporation to appear and answer as to the contempt alleged to have been committed by it. (*Hills agt. Peckskill Savings Bank*, 30 *Hun*, 546.)
4. A warrant issued by a district attorney, as authorized by the statute (*chap. 338, Laws of 1847*), for the arrest of the relator, stated that he stood indicted "for contempt." On *habeas corpus*, issued on the petition of the relator: *Held*, that this was a sufficient specifica-

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tion of the offense; that as the statement was of a contempt which has already served as a basis of an indictment, it necessarily implied a willful contempt, of a character constituting a misdemeanor. (*People ex rel. agt. Mead*, 92 N. Y., 415.)

5. Also *held*, that as the indictment was found prior to the enactment of the Code of Criminal Procedure the provisions therein (*secs.* 301, 302) as to the form of bench warrants did not apply (*sec.* 962), nor was it a case of a commitment for contempt specified in the provision of the Revised Statutes (2 R. S., 567, *sec.* 40) in relation to *habeas corpus*. (*Id.*)
6. Also *held*, that it was not essential to the validity of the indictment that the accused should first have been adjudged guilty of contempt by the court whose process he disobeyed. (*Id.*)
7. The relator was served with a subpœna, requiring him to appear before the court of oyer and terminer in the county of Albany. He was called, and omitted to appear: *Held*, that he was properly indicted for contempt in that county; that the offense was there committed. (*Id.*)
8. The indictment was found by the court of sessions of Albany county; the application for the writ of *habeas corpus* was made to a justice of the supreme court in New York. At the time of the hearing thereon the court of oyer and terminer in and for Albany county was in session: *Held*, that the oyer and terminer had authority to try the prisoner (2 R. S., 205 *secs.* 29, 30), and so that the justice had no authority to let the prisoner to bail (2 R. S., 728, *secs.* 56, 57). (*Id.*)
9. A judgment debtor who has been served with an order for appearance and examination in pro-

ceedings supplementary to execution, which forbids him from transferring any of his property until further directions, is not guilty of contempt in applying his earnings for services rendered within sixty days of the commencement of the proceedings to the support of his family. (*Hancock agt. Sears*, 93 N. Y., 79.)

CONTRACT.

1. If the complaint set forth a cause of action either in tort or assumpsit, it is sufficient, and the plaintiff will recover such a judgment as the facts warrant, irrespective of the form of the action. (*Austin agt. Seligman*, *ante*, 87.)
2. Where the complaint alleged that some time prior to April 15, 1883, the plaintiff delivered to K. & Co. certain jeweler's sweepings to be refined, and agreed to pay the firm a certain price for refining the same. By the terms of the agreement between them, the sweepings were to be refined, and the product thereof delivered to or accounted for, and the value thereof, less the agreed price for refining the same paid to the plaintiff within twenty days from the delivery thereof. It further alleges that on April 13, 1883, K. & Co. transferred and delivered all the property at their refinery works, including the said sweepings, to defendants, upon the agreement that defendants should fully pay and discharge all the debts, obligations and liabilities of K. & Co. It then avers that twenty days have elapsed since the delivery of the sweepings to K. & Co., and the plaintiffs have demanded of them and of the defendants the return of the sweepings, or, in default thereof, the delivery of the product or value, upon payment of the agreed price for refining the same; that defendants and K. & Co. have neglected and refused to comply with the

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demand. On demurrer to the complaint:

Held, first, that the delivery of the sweepings to K. & Co. was not a bailment, because they had a right to return money in its place and trover is not an appropriate remedy.

Second. That plaintiff cannot maintain assumpsit upon the agreement set forth, because there is no recognition in it of any liability to him and nothing to indicate that any claim of his was present to the contemplation of the parties. (*Id.*)

3. The plaintiff, in April, 1883, through his agent and attorney, entered into a contract with defendant to purchase of the latter two pieces of real estate for \$127,500, the purchaser to pay the broker's commissions \$1,275, upon the sale. The broker through whom the sale was made, who was not expressly employed by defendant, had given plaintiff's agent, without the knowledge or authority of defendant, a diagram on which was stated the width of one of the premises, but the contract was executed for the sale of the property by street numbers, nothing being then stated about a diagram. On the day prior to the execution of the contract, plaintiff had contracted to sell the same premises for \$138,000, and paid \$1,380 for the broker's commissions on such sale. When, on the day fixed for closing the sale, defendant tendered a deed, it appeared that the width of one piece of property was four feet less than the dimensions shown upon the diagram, and plaintiff declined to accept the deed without a deduction for the deficiency, and sought by this action to recover the amount for brokers commissions paid by him besides \$2,500 paid on execution of the contract:

Held, that plaintiff, there being no fraud or mutual mistake, was bound by the contract, and time

not being of its essence, is still entitled to perform it according to its terms. If he fail to perform it, judgment should be for the defendant, as no right of action arises for the commissions, the \$1,275 being received as a condition precedent to the execution of the contract, and the \$1,380 having been paid in advance before plaintiff had any legal right to sell the property. (*Emerson* agt. *Roof*, ante, 125.)

4. The plaintiff, with others, owners and inventors of appliances in telegraphy, in December, 1878, entered into a syndicate agreement, and defendants Angle and Craig, as trustees of the syndicate, issued to plaintiff a certificate for twenty shares of its stocks. The defendant Wallace was afterwards joined as trustee with Angle and Craig. The defendant Telegraph Company was organized soon after, and its 30,000 shares of stock distributed equally among three trustees, its corporators, one of whom was defendant Wallace. The syndicate inventions and patents were transferred by Angle, Craig and Wallace for 20,000 shares of the company's stock to the three trustees of the defendant company, Read, Brown and Wallace, who at the same time transferred them to the company. After the company had gone into operation, a certificate for the 20,000 shares due the trustees of the syndicate was made out, but was never issued to them. In this action to assert plaintiff's title in the trust property as member of the syndicate:

Held, that the corporation was chargeable, not only by the connection of Wallace with its organization, but by the fair inference to be drawn by the course of dealing with the several parties, with knowledge of the representative character of the persons with whom it was dealing; that there has been a plain violation, through the instrumentality of

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the trustees, and by their misconduct or the misconduct of some of them, of the rights of the beneficiaries under these contracts, and that plaintiff is entitled to the relief sought. (*Bear agt. American Rapid Telegraph Company, ante, 274.*)

5. A note or memorandum of contract for the sale of chattels is not valid unless the name of the party to be charged is signed below or at the end of the memorandum. And it is error to hold that if the name of the party to be charged can be found on the paper, he has subscribed all that part of the agreement that precedes his signature. (*McGivern agt. Fleming, ante, 300.*)

6. Plaintiff had a contract to purchase lands of one S., dated January 27, 1883. The deed was to be taken in ninety days. Plaintiff assigned the contract to defendant on the 28th of January, 1882. The assignment was contained in two papers. One absolutely conveyed the contract to purchase for fifty dollars to the defendant and was executed by plaintiff only, and the other was an agreement between the parties that defendant should pay plaintiff \$450 cash or one-third of the profits of the purchase, the option to be exercised by defendant within the time during which he could take the deed. On February 10, 1883, there was indorsed on the contract, in reference to the payment of the \$450, or a share of the profits, these words: "In consideration of the sum of fifteen dollars to me in hand paid, I hereby agree to modify and change the foregoing contract by accepting in full payment and satisfaction thereof the sum of \$425, signed John A. Husson." The only difference between the parties was, the plaintiff claimed the right to the \$425 to be absolute and unconditional, the defendant claiming that it was dependent

upon the plaintiff taking the deed which he never did. There was no dispute about the agreement but only as to its effect:

Held, that the plaintiff is entitled to recover under either paper. The defendant was bound to take a deed within the time limited. If he took no deed (which is admitted) he was bound to pay \$450 at the end of ninety days from the date of the Smith contract. The abandonment of performance by him was a legal option to pay the money price. The claim is limited to the amount called for by the modification, and was payable at once in the place of the original option. (*Husson agt. Oppenheimer, ante, 306.*)

7. The time for the payment of money or for the performance of a written agreement may be extended by parol. (*Schmidt agt. Couperthwait, ante, 477.*)
8. What amounts to a valid extension. (*Id.*)

CORPORATIONS.

1. Where a creditor of a corporation seeks to charge a trustee personally with a debt, upon the ground that in pursuance of the eighteenth section of chapter 611 of the Laws of 1875 he signed and caused to be filed an annual report which, as the complaint alleged, was false in a material representation—viz., that the whole of the capital stock of \$700,000 had been paid in full, when in fact it was issued in exchange for an interest in real property not exceeding \$200,000—it is not necessary to aver that the transaction was a fraudulent cover for a fictitious payment of the stock, or that the trustees had no actual belief in the value of the land, or no reasonable ground or basis for such belief, and that the issue of the stock for the land was done with the fraudulent purpose of evading the statute, when it is

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alleged the defendant knew the report to be false when he signed it. (*Taylor* agt. *Thompson*, ante, 102.)

2. In an action by the creditors of a corporation against the directors thereof to hold them personally liable, because the debts of the corporation created by defendants exceed the amount of its capital stock, it is enough to state the amount of such capital and to give the amounts of the claims which are outstanding, and it is not necessary that the debts should be due. If an apparent claim is not real, the fact should be set up by answer (*Robinson* agt. *Attrill*, ante, 121.)

CORPORATE RECEIVERSHIPS.

1. A receivership in a creditor's suit to sequester the property of a railroad company comes within the spirit and intent of the law of 1883, requiring notice to be given to the attorney general of all proceedings in an action for the dissolution of a corporation or a distribution of its assets; and such receiver cannot be legally appointed without compliance with this provision. A receiver, in an action to foreclose a mortgage executed by the company, has the right to apply to be relieved from the void order or judgment, if it injuriously affects him in the discharge of his duties, although he has not in any form been made a party to the creditors' action. (*Whitney* agt. *The New York and Atlantic Railroad Company*, ante, 436.)
2. Subsequent proceedings to subject the attorney general to the order and judgment appointing and continuing the receiver in the creditors' action without notice to the receiver in the foreclosure action, whose motion to vacate such order and judgment had been heard and submitted, were very

improper and they had no practical effect in the case. (*Id.*)

3. The order appointing the receiver in the creditors' action should, in any event, be so limited as to restrict his receivership to the property, contracts and effects of the company, not included in nor incumbered by the mortgage, which is unassailed. (*Id.*)
4. It is not necessary to give notice to the attorney general, in an application for the appointment of a receiver in a suit, to foreclose a corporate mortgage. (*Id.*)

COSTS.

1. Upon an appeal from the city court, general term, to the common pleas, full costs follow, whether the appeal be from an order or a judgment and whether the appeal be dismissed or disposed of on the merits. (*Goodridge* agt. *Connor*, ante, 143.)
2. In an action brought and a recovery had against an executor to justify the imposition of costs against such executor it must appear that the claim was presented to the executor after he had qualified and entered upon the discharge of his duties, and that after such presentation and before suit he refused to refer it as prescribed by law, or that he unreasonably resisted or neglected its payment. (*Chesebro* agt. *Hicks*, ante, 194.)
3. A motion for costs will be denied where there is no legal proof of the presentation of the claim sued on, after the granting of letters of administration to the executor, and of its rejection by him. (*Id.*)
4. It is not an "unreasonable resistance of a claim" which was barred by the statute of limitations, unless there had been a payment thereon by the deceased, whose

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estate the executor represented and of which he had no personal knowledge, to require the proof thereof to be submitted to a court in an action in which he voluntarily appeared in order that no charge of want of fidelity to the estate could be made. (*Id.*)

5. In this action, brought to foreclose a mortgage, it was claimed that the whole amount had become due by reason of the failure of the mortgagor to pay the sum of seventeen dollars and fifty cents of interest, within thirty days from the time it fell due. The court held that the payment of the interest was deferred with the consent of the plaintiff's agent and in her interest, and under such circumstances as to prevent her from electing to consider the whole amount of principal secured by the mortgage as due. It further held that no sufficient tender of the interest had been made, and directed the usual judgment of foreclosure and sale, for the amount of interest due when the action was commenced, without costs: *Held*, that the action of the court in so doing, and in not awarding costs to the defendant, was not so unreasonable or oppressive as to require the review of its judgment. (*House* agt. *Eisenlord*, 30 *Hun*, 90.)
6. In this action, brought to recover penalties for violations of the acts to prevent the adulteration and dilution of milk, the complaint set forth separately twenty-three causes of action. The answer was a general denial. Upon the trial the plaintiff, having given evidence tending to establish thirteen of the causes of action, recovered a verdict "for two counts at fifty dollars each, amounting to one hundred dollars." The defendant claimed to be entitled to tax costs in his favor under section 3234 of the Code of Civil Procedure, providing that where the complaint sets forth separately two or more causes of action upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the others, each party is entitled to costs against the adverse party: *Held*, that the claim was not well founded, as the defendant had not recovered upon any of the issues within the meaning of the said section. (*Cooper* agt. *Jolly*, 30 *Hun*, 224.)
7. A defendant who had appealed from a judgment rendered against him in a county court having neglected to print and serve his papers, a third person who had been allowed to appear and protect his interest in the judgment appealed from, moved under General Rule No. 40, to have the case stricken from the calendar and for a judgment of affirmance. The motion was granted, with ten dollars costs, unless the appellant should serve the printed papers within thirty days. Upon his failure so to do a judgment of affirmance was entered in which were included twenty dollars for costs before, and forty dollars for costs of argument: *Held*, that this was proper. (*Sprague* agt. *Richards*, 30 *Hun*, 246.)
8. Where, in an action brought against a sheriff to recover a sum of money or a chattel, by reason of some act done by him by virtue of his office, a final judgment is rendered in his favor, he has an absolute right to the additional costs given by section 3258 of the Code of Civil Procedure. He has the same right to the increased costs as to the single costs given by section 3229. (*Smith* agt. *Cooper*, 30 *Hun*, 395.)
9. Where a judgment of a court-martial is brought into the supreme court by a writ of *certiorari* and there reversed, the respondent is personally liable for the costs awarded by the final order,

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- and may be adjudged guilty of a contempt if he fail to pay them after a demand therefor has been duly made. (*Matter of Leary*, 30 Hun, 394.)
10. During the pendency of an action against an executor for misappropriation of moneys belonging to the estate, he died, and his executor was substituted as party defendant. Judgment was recovered, which the defendant was directed to pay out of the estate; costs were also given, which were directed to be paid in like manner. The real estate of the deceased executor was sold by order of the surrogate: *Held*, that the surrogate properly disallowed the costs as a claim, payable out of the proceeds of sale (*Code of Civil Procedure* secs. 2756, 2757). (*In re estate of Fox*, 92 N. Y., 93.)
11. Under the provision of the Code of Civil Procedure (*sec.* 3271) giving to the court discretionary power to require the plaintiff in an action brought by or against an executor, administrator, &c., in his representative capacity, to give security for costs, the court has power to require such security of one bringing suit in such capacity, although there is no evidence of mismanagement or bad faith, and aside from the question of his personal liability for costs as prescribed by the Code (*Sec.* 3246). (*Tolman* agt. *Syr., B. and N. Y. R. R. Co.*, 92 N. Y., 353.)
12. Where a plaintiff is entitled to costs, under the Code of Civil Procedure (*sec.* 3228), upon entry of judgment in his favor, and such judgment is reversed and new trial granted by the general term "with costs to appellant to abide the even," but is affirmed on appeal by plaintiff to this court, he is entitled, of course, to the costs of the appeals to the general term and to this court (*Code*, *sec.* 3238). (*Murtha* agt. *Curley*, 92 N. Y., 359.)
13. The provision of the Code of Civil Procedure (*sec.* 3253), in reference to extra allowances of costs, simply authorizes such an allowance in an action wherein rights of property are involved and a pecuniary value may be predicated of the subject-matter; the importance of a litigation in any other than its pecuniary aspect affords no basis for the allowance, and when no money judgment is asked or rendered and the "subject-matter involved" is not capable of a money value, or the value is not shown, the allowance is not authorized. (*Conaughty* agt. *Saratoga Co. Bk.*, 92 N. Y., 401.)
14. The term "subject-matter involved" refers simply to property or other valuable thing, the possession, ownership or title to which is to be determined by the action, it does not include other property although it may be directly or remotely affected by the result. (*Id.*)
15. Within the limitations fixed by said provision, the power of the court below to make allowances is not subject to review here; but the question whether an allowance exceeds those limitations is one of law, proper to be considered by this court. (*Id.*)
16. In an action, therefore, brought to restrain a corporation from the exercise of its corporate franchises: *Held*, that the subject-matter involved was simply the corporate franchises, not its capital and moneyed assets; that in the absence of any evidence as to the money value of those franchises, an extra allowance was improper, and that an order allowing it was reviewable here. (*Id.*)
17. Under the Code of Civil Procedure (*sec.* 709), in an action in the supreme court, triable and tried in the first judicial district, an application for an extra allowance of costs must be made in that district, although the justice be-

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fore whom the cause is tried resides in another district. (*Hun agt. Salter*, 92 N. Y., 651.)

18. The rule of the supreme court (44), requiring such an application to be made to the court before which the trial is had or the judgment rendered does not authorize it to be made out of the district. (*Id.*)

19. In a proceeding under the mechanics' lien law of 1862 (*Chap. 478, Laws of 1862*), to foreclose a lien, the owner may be adjudged to pay the costs of the proceedings in addition to the sum found to be due the contractor; the court has power, also, to adjudge costs against the owner to the co-defendants, lienors. (*Kenney agt. Apgar*, 93 N. Y., 539.)

COUNTER-CLAIM.

1. A claim for the wrongful conversion of a chattel, which is a cause of action arising out of a tort, cannot be set up by way of a counter-claim in an action arising upon contract. (*Bell agt. Lesbini, ante*, 385.)

2. A party who has brought an action is not precluded from setting up the same matter as a counter-claim in a cross action, but will be compelled to elect between his own suit and the recoupment claimed, and if he elects the latter, his own suit will be stayed. But the rule does not extend so far as to allow a defendant to plead the same counter-claim to three independent actions brought by the same plaintiff. After using the counter-claim in the first action, the plaintiff may, in his reply, in the second and third actions, plead in abatement the fact that such counter-claim has been pleaded in the first action. (*Tuckerman agt. Corbin, ante*, 404.)

3. The defendant should have pro-

tested himself by moving to consolidate the actions or to stay the second and third actions until the first action was disposed of. (*Id.*)

4. Where, in an action brought by plaintiff for the recovery of damages for the breach of a contract alleged to have been made by eleven defendants contracting jointly, the answer of three of the defendants denies the making of the contract alleged, but avers that the contract, whatever may have been its terms, was with the three defendants, and in respect to that sets up counter-claims:

Held, that such counter-claims are tenable and well pleaded under section 1204, Code of Civil Procedure; that these defendants were not concluded by the allegations of the complaint, but could deny the joint liability, aver a several liability as to themselves, and then set up their counter-claims; that the issue as to whether the contract was with all the defendants sued, or those who set up the counter-claims only, is an issue to be determined on the trial of the case, and if it should turn out to be correct, as the answer avers, the counter-claims would be legally applicable to any claim which might exist in favor of the plaintiff under the agreement or agreements (*Affirming S. C.*, 60 *How.*, 498.) (*Olegg agt. Cramer, ante*, 411.)

5. In an action for the alleged wrongful taking and conversion of a quantity of wood, defendant set up as counter-claim, in substance, that he held a bond and a mortgage as a collateral upon certain lands which were insufficient security, and the obligor was insolvent; that the plaintiff being a second mortgagee in possession of the lands, with knowledge of the facts and with intent to reduce and deprive defendant of its security, and to defraud it, wrongfully cut the wood in question from the said land, thereby wast-

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ing the land, etc., to defendant's damage; that on foreclosure of defendant's mortgage and sale thereunder, a large deficiency was left: *Held*, that defendant's claim was "connected with the subject of the action" within the meaning of the Code of Civil Procedure (*sec.* 501), and so constituted a proper counter-claim. (*Carpenter* agt. *Man. L. Ins. Co.*, 93 *N. Y.*, 552.)

6. A counter-claim must have such a relation to the subject of the action that it will be just and equitable that both should be settled by one litigation, and that the claim of the defendant should be offset against or applied upon that of the plaintiff. (*Id.*)

COUNTER-CLAIM.

1. The practice does not permit a defendant, even though he has concealed in his answer a counter-claim, to stand by and permit the plaintiff to proceed as though no counter-claim were pleaded, and thus attempt to take advantage of the omission to file a reply by moving to dismiss the plaintiff's complaint. (*Bear* agt. *American Rapid Telegraph Co.*, *ante*, 274.)

COURT OF APPEALS.

1. The complaint herein set forth a demand for \$398.71; the answer denied liability and set up a counter-claim for \$801.29. The trial court found with defendant and gave judgment against plaintiff for the counter-claim. The general term reversed the judgment: *Held*, that the amount of the two claims constituted "the matter in controversy," within the meaning of the Code of Civil Procedure (*sec.* 191, *subd.* 3), and that this court had jurisdiction on appeal. (*Crawford* agt. *West Side Bk.*, 92 *N. Y.*, 631.)

2. A preference on the calendar of this court of an action for dower, authorized by the Code of Civil Procedure (*sec.* 791, *subd.* 6), can be claimed only when the proof required, *i. e.*, that plaintiff "has no sufficient means of support aside from the estate in controversy," was made and an order allowing the preference obtained as required (*sec.* 793), before the notice of argument was served. (*Bartlett* agt. *Musliner*, 92 *N. Y.*, 646.)

3. Where in an action in which the people were parties, and appeared by the attorney general, the latter did not, at the time of serving notice of argument, give notice of a particular day in the term on which he would move it, as prescribed by the provisions of the Code of Civil Procedure (*sec.* 791, *subd.* 1) to entitle the cause to a preference, but served with the notice of argument notice of motion that the cause be set down for a day named, which motion failed, because the court adjourned before the day specified for making it: *Held*, that the action was not entitled to a preference. (*People ex rel.* agt. *Kinney*, 92 *N. Y.*, 647.)

CREDITOR'S SUIT.

1. A receivership in a creditor's suit to sequester the property of a railroad company comes within the spirit and intent of the law of 1883, requiring notice to be given to the attorney general of all proceedings in an action for the dissolution of a corporation or a distribution of its assets; and such receiver cannot be legally appointed without compliance with this provision. A receiver, in an action to foreclose a mortgage executed by the company, has the right to apply to be relieved from the void order or judgment, if it injuriously affects him in the discharge of his duties, although he has not in any form been made a

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party to the creditors' action. (*Whitney* agt. *N. Y. and Atlantic R. R. Co.*, ante, 436.)

2. Subsequent proceedings to subject the attorney general to the order and judgment appointing and continuing the receiver in the creditors' action without notice to the receiver in the foreclosure action, whose motion to vacate such order and judgment had been heard and submitted, were very improper and they had no practical effect in the case. (*Id.*)
3. The order appointing the receiver in the creditors' action should, in any event, be so limited as to restrict his receivership to the property, contracts and effects of the company, not included in nor incumbered by the mortgage, which is unassailed. (*Id.*)
4. It is not necessary to give notice to the attorney general, in an application for the appointment of a receiver in a suit, to foreclose a corporate mortgage. (*Id.*)

CRIMINAL LAW.

1. Where a prisoner has been indicted for grand larceny, and is on trial before a jury in the court of oyer and terminer, or of the sessions, they have the power to find a verdict of petit larceny. (*The People* agt. *McTameney*, ante, 70.)
2. Petit larceny is a misdemeanor, and is punishable under section 15 of the Penal Code by imprisonment in the penitentiary or a county jail for not more than one year, or by a fine of not more than \$500, or both. (*Id.*)

CRIMINAL TRIAL.

1. The provision of the constitution of New York (*art. 1, sec. 6*), which

declares that "in any trial in any court whatever, the party accused shall be entitled to appear and defend in person and with counsel," gives to a prisoner every privilege which will make the presence of counsel upon the trial a valuable right, and this must include a private interview with his counsel prior to the trial. (*People ex rel. Burgess* agt. *Risley*, ante, 67.)

2. Upon the trial of an indictment for murder, evidence was received on the part of the prosecution, under objection and exception, to the effect, that upon the coroner's inquest a witness testified that shortly after the murder a stranger called at her house and asked the way to Sandy Hill, and also for a drink of water; that the prisoner and a number of others were placed around a room, and the witness pointed out the prisoner as the one who so called; also, that a number of persons, including the prisoner, passed behind her, each one repeating the question asked her by the stranger, and that she identified the prisoner by his voice, and that the prisoner on that occasion did not deny that he was such stranger: *Held*, that the examination before the coroner was of a judicial character; that the experiments so made were part of the proceedings; that the prisoner was not bound to speak, and his silence could not be regarded as an evidence of guilt; and therefore that the evidence was improperly received. (*People* agt. *Willett*, 92 *N. Y.*, 29.)

3. Upon the trial of an indictment for murder, a juror, challenged by the prisoner for principal cause, testified, in substance, that he had read and talked about the case, and had formed an opinion as to the guilt or innocence of the prisoner, but that such opinion would not, as he believed, influence his verdict, and that he could render an impartial verdict: *Held*, that the challenge was properly

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overruled (*Code of Criminal Procedure*, sec. 376). (*People* agt. *Corretti*, 92 N. Y., 85.)

4. It appeared that the prisoner and C., the deceased, were, at the time of the homicide, convicts confined in a state prison. On the morning of the homicide another convict, after sharpening a case-knife, laid it down and went to another part of the room; on his return he found the knife had been taken away. The prisoner was near where the knife was left, and in a position where he could have seen it. A few moments thereafter the prisoner approached C. and stabbed him with a knife, which was identified as the one so sharpened. C. died in a few minutes. The witnesses for the prosecution testified that no words passed between C. and the prisoner, and there was no assault or provocation by the former: *Held*, that the prisoner was properly convicted of murder in the first degree. (*Id.*)

5. An indictment for false pretenses averred, in substance, that the accused having contracted to sell to B., the complainant, certain premises, fraudulently exhibited to B., who was illiterate and unable to read, a deed which he falsely represented to be a deed of the premises, when in fact the description covered other premises, &c. What purported to be a copy of the deed was set forth in the indictment. The deed offered in evidence on trial showed that in the copy in the indictment the easterly and westerly boundary lines were omitted. The copy, however, showed inferentially the length of these two lines: *Held*, that the variance was not material. (*Webster* agt. *People*, 92 N. Y., 422.)

6. The indictment did not allege that the deed was under seal. It was so stated, however, in the attesting clause, a copy of which was set

forth: *Held*, this, with the averment that the instrument was a deed, amounted to a substantial averment that it was under seal. (*Id.*)

7. Where such an indictment sets forth various pretenses alleged to be false, if one or more are proved to be false, and are sufficient *per se* to constitute the offense, a conviction is proper, notwithstanding the failure of the prosecution to prove the other alleged pretenses to be false. (*Id.*)

8. In the absence of exceptions on a criminal trial this court has no power to review the case upon the facts. (*People* agt. *Hovey*, 92 N. Y., 554.)

9. The provision of the Code of Criminal Procedure (sec. 527) as amended in 1882 (*chap. 360, Laws of 1882*), providing that "the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice required a new trial whether any exceptions shall have been taken or not," applies only to appeals to the supreme court. (*Id.*)

10. An exception to a charge taken after a criminal trial has terminated, does not present any question for the consideration of an appellate court. (*Id.*)

11. Where, therefore, after a criminal trial, and when the prisoner was before the court for sentence, his counsel moved for a new trial for an alleged error in the charge, and upon denial of the motion took an exception: *Held*, that no question was thereby presented here for review. (*Id.*)

12. *It seems* that where, upon such a trial, upon objection of the prisoner, his wife, who was an eye-witness to the transaction in question, is excluded as a witness,

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the jury has a right to infer that her evidence would not have been favorable to him, and a submission of that question to them is not error. (*Id.*)

13. Where, to an indictment for murder, the defendant pleaded "guilty to manslaughter in the first degree:" *Held*, that an acceptance of the plea and a judgment thereon was proper; that it was not necessary to aver in the indictment the facts which, if proven, would constitute the lesser crime. (*People* agt. *McDonnell*, 92 *N. Y.*, 657.)

14. Upon trial of an indictment for assault with intent to kill, evidence showing the commission by the prisoner of another similar assault, at a different time and place, and upon a different person, is not competent. (*People* agt. *Gibbs*, 93 *N. Y.*, 470.)

COUNTY COURT.

1. Where a person has entered into a written agreement to pay and discharge a mortgage and has thereafter taken an assignment thereof to himself instead of causing the same to be satisfied, an action may be brought against him in a county court to compel him to satisfy and discharge the mortgage, and to pay to the plaintiff the damages occasioned by his failure so to do. (*Mosher* agt. *Campbell*, 30 *Hun*, 230.)
2. A county court has no power, upon the trial of an action, to non-suit the plaintiff and order the exceptions to be heard in the first instance at the general term, staying all proceedings in the meantime. (*Johnson* agt. *N. Y. O. and W. R. R. Co.*, 30 *Hun*, 166.)

DEED.

1. Where, in the description in a deed, the place of beginning of

the premises conveyed were stated to be at a point on the westerly side of an avenue, a certain distance from the "south-easterly corner" of the avenue and a street, and the description contains evidence that the word the draftsman intended to use was "south-westerly corner," the court should, in the interpretation of this description, read it so as to transform the word "south-easterly" into the word "south-westerly," and the defendant should be compelled to fulfill his contract to purchase the premises described in said contract, in accordance with the corrected description. (*Bookman* agt. *Furzman*, *ante*, 237.)

DEPOSITION.

1. In an action instituted by the attorney general to dissolve a life insurance company, the holder of a policy in or a creditor of the corporation who has not intervened in the action should not be granted an order for the examination of a person as a witness to be used upon a motion under section 885, Code of Civil Procedure. (*Matter of Attorney General* agt. *Continental Life Ins. Co.*, *ante*, 51.)

DOWER.

1. Where a wife does not join with her husband in a mortgage upon realty and is not made party to the foreclosure of such mortgage, she has an inchoate right of dower in said premises after sale upon the foreclosure judgment, although, after the filing of the *lis pendens* in the foreclosure action and before the entry of the judgment, a deed from the husband to A. of said premises, purporting to have been made three years previously and taken subject to the mortgage, was recorded in the same office, and that thereafter, and before the entry of judgment, a deed of said premises from A. to the wife, sub-

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ject to said mortgage, was also recorded in the same office; and the purchaser at the foreclosure sale cannot be required to complete his purchase, the title not being good. (*The People* agt. *Knickerbocker Life Ins. Co.*, ante, 115.)

ELECTION.

1. Irregularities in an election which would not change the result will not be rectified in the courts. If an election is irregular, *certiorari* is the proper remedy. (*Dows* agt. *Village of Irvington*, ante, 93.)

EVIDENCE.

1. The defendants in this action, heirs-at-law of the plaintiff's testatrix, contested the validity of her will, upon the grounds of a lack of testamentary capacity and of undue influence. Upon the trial the plaintiff called one Monk, the physician who had attended the deceased in her last sickness, and was allowed to prove by him what was said and done by her, at an interview had by him with her at her house at which the plaintiff was present. The plaintiff was allowed to introduce this testimony to show that the witness "made a test of the memory of the testatrix, then or thereafter, to ascertain her capacity to make a will." The witness having been instructed by the judge to avoid stating any information received by him, which was required to enable him to act as her physician, was allowed to answer the question, what was his impression in that interview as to the condition of the testatrix, whether rational or irrational, as follows: "Her gestures and conversation, language, everything that I could observe, impressed me as coming from a person of ordinary sound mind." *Held*, that the evidence was not prohibited by section 834 of the Code of Civil Procedure
2. The defendants called the wife of one of the contestants to testify to "the actions, conduct and sayings" of the testatrix, on certain occasions when the witness was at her house: *Held*, that as the deceased left real estate in which the witness would have an inchoate right of dower, if the will were declared void, she was interested in the event of the action, and so disqualified, under section 829 of the Code of Civil Procedure, from testifying as to personal transactions or communications had with the deceased. (*Id.*)
3. But that as the burden of proving the incompetency of the witness rested upon the party objecting, and as it did not appear from the question, nor from the other facts proved upon the trial, that the witness would necessarily be compelled to testify as to a personal transaction or communication with the deceased in order to answer the question, that the court erred in refusing to allow it to be put. (*Id.*)
4. After issue had been joined in this action the depositions of the plaintiff and defendant were taken under a stipulation signed by their attorneys, providing among other things that such depositions might be read upon the trial. The plaintiff was cross-examined by the defendant's counsel in the defendant's presence. The defendant died before the trial and his executrix was substituted in his stead: *Held*, that the deposition of the plaintiff should have been received in evidence, when offered by him upon the trial, although it related to personal transactions had with the deceased. (*Macdonald* agt. *Woodbury*, 30 *Hun*, 35.)
5. This action was brought by the

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plaintiff upon a bond given to him by one Carpenter and Azubah, his wife, against the executor of Azubah. It was defended upon the ground that the bond was, after its execution, altered by the insertion of a clause binding the separate estate of the wife. Upon the trial the plaintiff was called as a witness in his own behalf, and testified that he was not present when the bond was signed, but that he saw it in the hands of his attorney, after it was drawn and shortly before it was executed, and that it then contained the clause in question as it appeared upon the bond: *Held*, that the evidence was inadmissible under section 829 of the Code of Civil Procedure, as relating to a personal transaction with the deceased: *Held*, further, that this section also prevented the plaintiff from testifying respecting conversations between himself and his attorney, prior to the execution of the bond, which tended to show that it contained the said clause. The testimony of the attorney as to such conversation, was admissible as a part of the *res gestæ*. (*Pease* agt. *Barnett*, 30 *Hun*, 525.)

6. The buildings occupied by the defendant, for the manufacture of wool, having been partially destroyed by fire, and a portion of the walls having fallen, and other portions thereof being insecure and dangerous, a Mr. Ware was employed by the defendant to put the buildings in a safe and secure condition. When the portion of the wall fell, it left standing portions of a brick cornice some thirty feet above the ground. Some of the brick in it were loose and liable to fall from a slight jar of the wall. A few days after the accident the plaintiff and some other laborers were employed by the defendant to assist in repairing the building under the direction of its superintendent, Mr. Ware. While working near the

wall above referred to, in removing a stick of timber, the plaintiff claimed that he was injured by the falling of a brick upon his leg. It was not claimed that the fall of the brick was occasioned by the removal of the timber, and the defendant claimed that if any brick fell it was by reason of the jarring of the wall by the running of machinery in other parts of the buildings. Upon the trial of this action, brought to recover damages for the injury so alleged to have been occasioned, the plaintiff was allowed, against the defendant's objection and exception, to testify that after the removal of the timber, and some two minutes after the occurrence of the accident, he told Mr. Ware of it, and that the latter stated that the brick came from the cornice; that he saw that some of the brick there were loose and lay cornerwise and off the cornice the day before, and that he meant to have them thrown down, but did not, and that he then called to one of the men to go with him and throw off the loose brick: *Held*, that the court erred in allowing the witness to testify as to the statements so made by Ware. (*Darling* agt. *Oswego Falls Mfg. Co.*, 30 *Hun*, 276.)

7. This action was brought by the plaintiff to recover damages for a personal injury alleged to have been occasioned by the defendant's negligence. Upon the trial, a girl who had slept with the plaintiff some three months after the injury, was allowed to testify that the plaintiff would sit on the edge of the bed and complain of pain in her arm and shoulder. *Held*, that the plaintiff's declaration was properly admitted as tending to characterize and explain her act in so sitting upon the bed. (*Nichols* agt. *Brooklyn City R. R. Co.*, 30 *Hun*, 437.)

8. Upon an application by the plaintiff for an order requiring the de-

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fendant to appear and submit to an examination before trial, it is not necessary that the affidavit should state explicitly that the plaintiff intended to produce the evidence so to be obtained as a part of the proof of his case upon the trial; it is sufficient if his intention so to do may be reasonably inferred from the statements therein contained. (*Fogg* agt. *Fisk*, 30 *Hun*, 61.)

9. The fact that the defendant will be privileged from testifying as to some of the matters as to which the plaintiff desires to examine him, is not a reason for denying the application, as the court will, upon the examination, afford the witness such protection as he may be entitled to. (*Id.*)

10. This action was brought by certain executors against a co-executor to recover the amount of a promissory note given by the latter to the testator. Upon the trial a witness was called by the plaintiffs whose testimony tended to establish the defendant's liability. Upon her cross-examination she was asked by the defendant's counsel whether it was not after a request by the executors to pay a sum which they alleged she owed the estate, that she first gave the information of the facts as to which she had testified: *Held*, that the referee erred in refusing to allow the question to be put; and that as the court could not say that its exclusion had not injured the defendant, the judgment must be reversed. (*Miles* agt. *Sackett*, 30 *Hun*, 68.)

11. This action was brought to recover the rent which had fallen due, under a lease of certain rooms, for the period of one year from May 1, 1879. The defendants set up as one of their defenses, that an action to recover rent upon the same lease had been brought against them by the plaintiff in a justice's court, in March,

1880, and that a judgment had been entered there in their favor. The plaintiff claimed that the said judgment was not a bar to this action, because it was rendered upon the ground that the rent did not fall due until the end of the year, and that none was at the time of such judgment due. Upon the trial of this action the pleadings used and the evidence taken in the former action were read, together with the record contained in the justice's docket. The justice, who was called as a witness, was asked and allowed to state that he decided the former case in the defendant's favor upon the ground that the rent was not due at the time of the commencement of the action: *Held*, that the court erred in allowing him so to do. (*Agan* agt. *Hey*, 30 *Hun*, 59.)

EXAMINATION OF PARTIES
BEFORE TRIAL.

1. Though to entitle a party to an order for the examination of the adverse party as a witness it must appear by the affidavit upon which the application is based that there was a *bona fide* purpose to take evidence of the party to use it upon the trial, yet it is not necessary to state it in direct and positive terms. The law will be complied with when that fact shall be made to appear as one that has been established by the evidence. (*Van Ruy* agt. *Harriott*, *ante*, 269.)
2. In actions resting upon fraud, deceit and fraudulent conspiracy, an order for the examination of a party defendant before trial will be vacated when the object of it is to procure testimony to establish the fraud. (*Andrews* agt. *Prince*, *ante*, 280.)
3. An order should not be granted to examine a defendant before trial, in a suit for damages for alleged slander, to obtain knowl-

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edge or information of the exact language used by him in disseminating a charge that plaintiff had participated in a scheme of black-mail against defendant. (*De Leon* agt. *De Lima*, ante, 287.)

4. To entitle a party to an examination of a defendant, it must appear that plaintiff has a cause of action against the defendant. Such examination will not be allowed for the purpose of informing plaintiff whether he has such a cause of action or not. (*Id.*)

5. Where an action was begun in the state court and an order thereafter obtained under sections 870, &c., Code of Civil Procedure, requiring the defendant to appear and testify before trial, and whilst the examination of the defendant was being had under such order, he removed the cause into the circuit court under "the local prejudice act:"

Held, that although in actions at law begun in the federal courts depositions cannot be taken under the state practice, yet where, as in this case, such an examination was actually pending at the time of removal, the right to continue the same is preserved under the act of congress of 1875, and on motion the defendant will be compelled to attend and testify under the order, although the plaintiff may not be entitled to read the deposition upon the trial. (*Fogg* agt. *Fisk*, ante, 343.)

6. Instances in which such depositions may be used. (*Id.*)

EXCEPTIONS.

1. Upon a writ of error no exception lies to a refusal to postpone a criminal trial by reason of the absence of witnesses. (*Webster* agt. *People*, 92 N. Y., 422.)

2. In the absence of exceptions on a criminal trial, this court has no

power to review the case upon the facts. (*People* agt. *Hovey*, 92 N. Y., 551.)

3. An exception to a charge taken after a criminal trial has terminated does not present any question for the consideration of an appellate court. (*Id.*)

4. Where, therefore, after a criminal trial, and when the prisoner was before the court for sentence, his counsel moved for a new trial for an alleged error in the charge, and upon denial of the motion took an exception: *Held*, that no question was thereby presented here for review. (*Id.*)

EXCISE LAW.

1. An injunction does not lie to restrain an illegal arrest, for the reason that if a party is illegally arrested he has a prompt and efficacious relief by *habeas corpus*, and also for the wrong he may sustain by an action for damages. (*Fincke* agt. *Police Commissioners*, ante, 318.)

2. The plaintiff is a keeper of a tavern in the city of New York, at No. 620 Grand street. The commissioners of excise, on the 30th of April, 1883, granted him a license to commence on that date and to terminate on the 1st of May, 1884, to sell strong and spirituous liquors, wines, ale and beer, in quantities of less than five gallons, for which he paid the fee prescribed by law. F., a barkeeper of plaintiff, was convicted of keeping open said place unlawfully on Sunday, May 13, 1883. (*Id.*)

3. Is a license forfeited by the conviction of an employe of the licensee of a violation of the statute? Did such conviction of an employe of the licensee, of a violation of the statute (*sec. 4, chap.*

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549 of *Laws of 1873*) forfeit his license, *quære*. (*Id.*)

4. The temporary injunction granted enjoined and restrained the police commissioners and their officers from closing up the business of a tavern carried on by plaintiff at 620 Grand street, and from preventing the plaintiff or his employes from selling strong and spirituous liquors, wines, ales and beer, in quantities less than five gallons, at said tavern, except on Sundays or election days, or any days between the hours of one and five o'clock in the morning, and from arresting said plaintiff or his employes by reason of their carrying on the business of keeping said tavern, or selling said wines, liquors, &c., until the further order of the court:

Held, that so far as the injunction relates to the arrest of the plaintiff or his employes, he has a perfectly adequate remedy at law for any injury which he may sustain by reason of the alleged unlawful action of the defendants, and the injunction cannot be continued. (*Id.*)

5. It seems doubtful, even in case of the defendants' threatening to close up the plaintiff's place of business, that he would be entitled to an injunction, because he has an adequate remedy at law against the defendants if they act illegally in closing such place of business by an action for damages. (*Id.*)

EXECUTOR.

1. In an action brought and a recovery had against an executor to justify the imposition of costs against such executor it must appear that the claim was presented to the executor after he had qualified and entered upon the discharge of his duties, and that after such presentation and before suit, he refused to refer it as prescribed

by law, or that he unreasonably resisted or neglected its payment. (*Chesebro agt. Hicks, ante, 194*)

2. A motion for costs will be denied where there is no legal proof of the presentation of the claim sued on, after the granting of letters of administration to the executor, and of its rejection by him. (*Id.*)
3. It is not an "unreasonable resistance of a claim" which was barred by the statute of limitations, unless there had been a payment thereon by the deceased, whose estate the executor represented and of which he had no personal knowledge, to require the proof thereof to be submitted to a court in an action in which he voluntarily appeared in order that no charge of want of fidelity to the estate could be made. (*Id.*)
4. A proceeding may be brought in this court by or against the executor or administrator of decedent A., who was himself the executor or administrator of decedent B., for an accounting with respect to decedent A.'s estate. The parties interested in the estate of decedent B. will be entitled upon such accounting to assert, in common with the other creditors of A., such claims as they may have against his estate on account of any liabilities he may have incurred by reason of his administration of B.'s estate. (*Matter of Ranney, ante, 291.*)
5. But there is no provision of law which authorizes the representatives of a deceased executor or administrator to initiate and conduct a proceeding for the accounting of their decedent in the estate whereof he was himself executor. (*Id.*)
6. Upon an application for leave to issue an execution upon a judgment recovered against a person, since deceased, made under section 1381 of the Code of Civil

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Procedure, an affidavit was presented, made by one of the two plaintiffs in the judgment, in which, after stating that the judgment was recovered by him and his co-plaintiff, he said "that said judgment is wholly unsatisfied and unpaid and is valid and subsisting." *Held*, that the affidavit was sufficient to justify the court in granting the application. *Wadley* agt. *Davis*, 30 *Hun*, 570.)

7. It is not necessary that the moving papers should contain a description of all the judgment debtor's lands; and where certain of his real estate is described therein, it is no defense to show that the debtor had other lands not included therein. (*Id.*)

8. Under an execution issued upon a judgment a constable levied upon a span of mules owned and used by the debtor in his business of farming and boating. He was a householder and had no other team. It did not appear what other property he then had. He did not at the time the levy was made, or at any other time, claim that the mules were exempt: *Held*, that he thereby waived any exemption to which he might have been entitled under section 1391 of the Code of Civil Procedure. (*Russell* agt. *Dean*, 30 *Hun*, 242.)

9. When order in bankruptcy proceedings, staying proceedings of sheriff on execution, and directing assignee to sell property levied on, and judgment in favor of assignee adjudging judgment on which execution was issued invalid, is a defense to an action against sheriff for a false return, in returning execution *nulla bona*. (See *Dorrance* agt. *Henderson*, 92 *N. Y.*, 406.)

EXTRA ALLOWANCE.

1. In a difficult and extraordinary case, where the defendant inter-

poses to plaintiff's claim as a defense and by way of a set-off two promissory notes, and upon the trial judgment is rendered for plaintiff upon all the issues involved and for the full amount claimed, the plaintiff is entitled to an extra allowance, not only upon the sum recovered in the action, but upon the basis of the defendant's set-off determined against him. (*Barclay* agt. *Culver*, *ante*, 342.)

FINDINGS.

1. The court must, at or before the time of rendering its decision, pass upon requests by either party to find certain facts and conclusions of law, and it is not sufficient that such findings should be passed upon on the settlement of the case. (*Masterson* agt. *Cranitch*, *ante*, 171.)

GAS COMPANY.

1. When a dispute arises between a gas company and a consumer, the latter is entitled to have his rights investigated by the courts, and in such case an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried (*Affirming S. C.*, 64 *How.*, 33). (*Sickles* agt. *Manhattan Gas-Light Co.*, *ante*, 304.)

2. A gas company's meter, even after being tested and inspected according to law, is not to be regarded as the absolute test of the quantity of gas consumed and charged for, but may be contested by other reliable testimony. (*Sickles* agt. *Manhattan Gas-Light Co.*, *ante*, 314.)

3. When a dispute arises between the company and a consumer, the latter is entitled to an injunction to prevent the cutting off of the supply of gas until the cause can be tried. (*Id.*)

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GENERAL TERM.

1. The general term has power and it is its duty to review the verdict in an action to recover damages for death caused by negligence, and to set it aside if it appears excessive or the result of sympathy and prejudice. (*Hooghkirk agt. Prest., &c., D. and H. C. Co., 92 N. Y., 219.*)

GUARDIAN AD LITEM.

The bond of a guardian *ad litem* of an infant defendant in partition may be made direct to the infant instead of to the people of the state, provided the order appointing the guardian so direct (*Sec. 1596, Code*). (*Thistle et al. agt. Thistle, ante, 472.*)

HABEAS CORPUS.

1. The purpose of the writ of *habeas corpus* is not to review trials before a magistrate on questions of vagrancy. (*Matter of Moses, ante, 296.*)
2. A warrant so issued by a district attorney as authorized by the statute (*chap. 338, Laws of 1847*) for the arrest of the relator, stated that he stood indicted "for contempt." On *habeas corpus* issued on the petition of the relator: *Held*, that this was a sufficient specification of the offense; that as the statement was of a contempt which has already served as a basis of an indictment, it necessarily implied a willful contempt of a character constituting a misdemeanor. (*People ex rel. agt. Mead, 92 N. Y., 415.*)
3. Also *held*, that as the indictment was found prior to the enactment of the Code of Criminal Procedure, the provisions therein (*secs. 301, 302*) as to the form of bench warrants did not apply (*sec.*

962), nor was it a case of a commitment for contempt specified in the provision of the Revised Statutes (2 *R. S.*, 567, *sec. 40*) in relation to *habeas corpus*. (*Id.*)

4. The indictment was found by the court of sessions of Albany county; the application for the writ of *habeas corpus* was made to a justice of the supreme court in New York. At the time of the hearing thereon the court of oyer and terminer in and for Albany county was in session: *Held*, that the oyer and terminer had authority to try the prisoner (2 *R. S.*, 205, *secs. 29, 30*), and so that the justice had no authority to let the prisoner to bail (2 *R. S.*, 728, *secs. 56, 57*). (*Id.*)

HARLEM RIVER AND SPUYTEN DUYVEL IMPROVEMENT.

See CONSTITUTIONAL LAW.

Matter of United States, ante, 517.

INDICTMENT.

1. Section 293 of the Code of Criminal Procedure authorizing the court upon the trial to amend an indictment where a variance, between the allegation therein and the proof, in respect to time, or in the name or description of any place, person or thing, shall appear, if the defendant cannot be thereby prejudiced in his defense on the merits, does not authorize the court to amend an indictment for grand larceny, charging the taking of a ring of the value of eight dollars, and certain gold and silver coin of the value of eighty dollars, by substituting for the allegation as to the taking of the gold and silver coin, others charging the taking of "bank bills," lawful money of the United States, of a kind, number and denomination unknown, and upon banks

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unknown, of the value of forty-five dollars, a more particular description of which cannot be given. (*People* agt. *Poucher*, 30 *Hun*, 576.)

INJUNCTION.

1. No action in equity will lie to restrain the enforcement of a judgment rendered by a court of record on the ground that the defendant in the action in which the judgment was rendered was not served with process. The plaintiff has an adequate remedy at law by motion in the original action. (*Fullan* agt. *Hooper*, ante, 75.)
2. Where the whole equity of the bill is not only denied, but its want of equity is established by a preponderance of proof, an injunction is never granted. (*Id.*)
3. There is no authority for the granting of an injunction restraining the enforcement of a judgment except on an undertaking providing absolutely for the payment of the judgment, with interest and costs. (*Id.*)
4. A gas company's meter, even after being tested and inspected according to law, is not to be regarded as the absolute test of the quantity of gas consumed and charged for, but may be contested by other reliable testimony. (*Sickles* agt. *Manhattan Gas-Light Co.*, ante, 314.)
5. When a dispute arises between the company and a consumer, the latter is entitled to an injunction to prevent the cutting off of the supply of gas until the cause can be tried. (*Id.*)
6. Unless an assignment for the benefit of creditors is void upon its face, or the extrinsic facts which go to show its invalidity

are most clearly made out, its legality is to be assumed; and a clear case voiding the assignment should be made out to justify the granting of an injunction against the assignee restraining him from executing the trusts created by it. (*Minzesheimer* agt. *Mayer*, ante, 484.)

See EXCISE LAW.

Fincke agt. *Police Commissioners*, ante, 318.

JUDGMENT.

1. The plaintiff, as administratrix, sued to recover \$3,500, claimed to have been wrongfully received by defendant as interest upon the foreclosure of a \$25,000 mortgage executed by the intestate, said sum being alleged to have been already paid to defendant for interest on said mortgage by the intestate in his lifetime. The complaint alleged that judgment of foreclosure and sale was duly entered and the premises afterwards duly sold by a referee duly appointed: *Held*, that it follows from the allegations of the complaint that in all these proceedings on foreclosure, the plaintiff's intestate had notice, and that the amount to, which the defendant in this action and the plaintiff in the foreclosure action was entitled for principal and interest was directly in issue; and the defendant is entitled to judgment on demurrer to the complaint. (*Bearnes* agt. *Bearnes*, ante, 456.)
2. The complaint in this action alleged, among other things, the recovery by the plaintiff's assignee of a judgment in the supreme court against the defendant for \$1,065.18, and that "said judgment was on said 11th day of May, 1860, duly docketed against said defendant in the office of the clerk of Monroe county." This action was brought in 1879 to re-

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- cover the amount due upon the said judgment: *Held*, that under section 532 of the Code of Civil Procedure, the judgment was sufficiently pleaded. (*Springsteene* agt. *Gillett*, 30 *Hun*, 260.)
3. Upon the trial the plaintiff introduced in evidence a judgment roll in an action of foreclosure, entered and filed in the said clerk's office April 17, 1860. The judgment directed a sale of the mortgaged premises by a referee who was directed to apply the proceeds of the sale to the payment of the costs and debt, and to specify the amount of the deficiency, if any, in his report of sale, and further directed that the defendant "pay the same to the plaintiff." He also introduced the referee's report of the sale, which was filed in the said clerk's office on May 11, 1860, showing that a deficiency had arisen of the amount for which the clerk had docketed the judgment. No order confirming the referee's report of sale was made: *Held*, that it was proper to allow such evidence to be introduced to prove the cause of action set forth in the complaint. (*Id.*)
 4. That the omission to procure an order confirming the report was a mere irregularity which the defendant should have moved to correct with promptness and which he had waived by his laches. (*Id.*)
 5. By an interlocutory judgment herein, defendants, as executors and trustees, were held jointly liable for losses occasioned by improvident investments made by J., a son of the testator, who, with their acquiescence and assent, had taken the whole control and management of the estate. A referee was appointed to take the accounts. Upon the hearing before the referee, W., one of the trustees, proved that his co-trustee had alone executed satisfaction-pieces of a large number of mortgages belonging to the estate, and delivered them to J., to enable him to receive payment, and claimed he should not be charged therewith: *Held*, untenable; that as the question had already been passed upon by the interlocutory judgment the referee was controlled thereby, and was charged with the duty only of taking the account on the basis thereof. (*Earle* agt. *Earle*, 93 *N. Y.*, 104.)
 6. A judgment against the commissioners of highways of a town, upon a contract for the repair of a highway, does not necessarily establish any liability on the part of the town. (*People ex rel.* agt. *Bd. Sup'rs Ulster Co.*, 93 *N. Y.*, 397.)
 7. The provision of the statute (1 *R. S.*, 357, sec. 8), making judgments by or against town officers in actions prosecuted against them in their name of office a town charge, refers only to actions brought by or against them upon contracts authorized by statute. (*Id.*)
 8. In order, therefore, to make a judgment against commissioners of highways a town charge, it must have been recovered upon a liability incurred by them acting within the scope of their authority, and in such case the claim therefor must be presented, passed upon and audited by the board of town auditors. (*Id.*)
 9. An appeal may be taken to the general term from an interlocutory judgment (*Code of Civil Procedure*, sec. 1349), but such a judgment can only be reviewed in this court on appeal from the final judgment (Secs. 190, 1336, 1350). (*Victory* agt. *Blood*, 93 *N. Y.*, 650.)

JURISDICTION.

See JUSTICES' COURT.

Conor agt. *Hilton*, ante, 144.

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1. The supreme court has power in the first instance to order the fees of a referee, appointed to take proofs and report as to the claims of a receiver of an insolvent life insurance company for compensation and expenses, to be paid directly out of the fund. (*Att'y-Gen'l agt. Cont'l L. Ins. Co.*, 93 N. Y., 45.)
2. Where a summons issued out of the marine court of the city of New York, in an action wherein an attachment and order directing service by publication was granted, stated the time within which defendant was required to answer at six days, instead of ten, as required by the Code of Civil Procedure (*sec. 3165, subd. 2*): *Held*, that the defect was not a jurisdictional one, but an irregularity merely; that the court obtained jurisdiction of the action from the time of granting the attachment (*Code, sec. 416*); that the summons, therefore, was amendable (*sec. 723*); and that an order amending it *nunc pro tunc* was properly granted. (*Gribbon agt. Freel*, 93 N. Y., 93.)
3. A court of equity has jurisdiction to decree the specific performance of a contract concerning chattel property alone, and while generally it will not exercise it, it is proper so to do where plaintiff's case is good, his right clear, and the remedy at law inadequate, or its enforcement attended with doubt or difficulty. (*Johnson agt. Brooks*, 93 N. Y., 337.)
4. Where, upon a hearing before commissioners appointed to appraise the damages, in proceedings to condemn lands for railroad purposes, the owner makes default, the supreme court, on motion to confirm the report of the commissioners, has power, the default being excused, to open it, set aside the report and order a new hearing. (*In re N. Y., L. & W. R. Co.*, 93 N. Y., 385.)
5. A recital in a bond, purporting to have been issued by a town under the act of 1869 (*chap. 907, Laws of 1869*) in aid of a railroad company, to the effect that all the necessary legal steps have been taken to comply with the statute, does not estop the town from questioning the validity of the bond, even in the hands of a *bona fide* holder. (*Craig agt. Town of Andes*, 93 N. Y. 405.)
6. The judgment of the county judge, in proceedings under said statute to bond a town, may be questioned for want of jurisdiction. (*Id.*)
7. The only effect of the provisions of said statute (*sec. 2*), giving to such judgment and record "the same force and effect as other judgments and records in courts of record," is to relieve the holders of bonds issued under it from proving the proceedings prior to the judgment, and to impose upon the town the burden of proving want of jurisdiction. (*Id.*)
8. Jurisdiction could only be conferred under said act by the presentation of a petition conforming to its requirements; it confers no jurisdiction upon the county judge to pass conclusively upon the form of the petition, and its sufficiency is always open to inquiry. (*Id.*)
9. Where, after the commencement of an action in the superior court of New York city to recover the amount of interest coupons upon bonds secured by a trust mortgage, the trustee commenced an action in the supreme court to foreclose the mortgage for the benefit of all the bondholders, who, including the plaintiff in the former action, were made parties: *Held*, that the supreme court had the power, in its discretion, to stay the proceeding in the superior court suit until the determination of the foreclosure suit. (*Cushman agt. Leland*, 93 N. Y., 652.)

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JUROR.

1. If a party is cognizant of the misconduct of a juror, and does not call attention to it the first opportunity, he waives the objection. He cannot keep the objection in silent reserve and spring it upon his adversary afterwards by motion or upon appeal. (*Valiente et al. agt. Bryan, ante, 302.*)

JURY.

1. Where, in an action to foreclose a mortgage given by A., a denial is interposed by B., who is joined with A. as defendant, that his title or interest is subordinate to that of plaintiffs, as alleged, and he claims possession by a title paramount and adverse to them, the complaint should be dismissed as to B., as the right of possession between A. and B. cannot be settled in a foreclosure action, but must be tried by a jury. (*Meigs et al. agt. Willis, ante, 466.*)

JURY LAW.

1. The defendant had been held to await the action of the grand jury, to convene at May term, 1883, of the Albany oyer and terminer. Before the grand jurors were sworn in the defendant by counsel appeared and filed a paper objecting to such individuals, collectively and severally, as grand jurors, and moved to set aside and discharge the entire number because each and every one had been obtained pursuant to the provisions of chapter 532 of the Laws of 1881 (which was claimed to be unconstitutional and void), and not in the manner prescribed by the Revised Statutes. It was thereupon consented by both parties that the motion should stand over without prejudice to defendant's rights or to the right and duty of the court; that if an in-

dictment should be found the objections should be considered and determined with the same force and effect as if decided prior to the organization of the grand jury. The grand jury then organized and found an indictment against defendant. About three months after an order was made in the oyer and terminer, that as to said defendant the body impaneled as a grand jury be set aside and discharged as of the date of the first presentation of the objections; that the said indictment be not received and stand as quashed; that nothing in the order was to affect the action of said grand jurors as to persons not having made such objection. On appeal from such order:

Held, first, that it was improper to quash or set aside the panel as to defendant, and yet in effect hold it good as to all other persons charged with crime who omitted to interpose objections, inasmuch as the objections raised a question of jurisdiction. If the panel was without jurisdiction as to defendant's case, it was equally without jurisdiction as to all others similarly charged. (*The People agt. Fitzpatrick, ante, 14.*)

2. *Second.* The objections urged in defendant's behalf, *i. e.*, that the grand jury was drawn from names selected under an unconstitutional law, cannot be maintained by one charged with a criminal offense, further than to see that the action or proceeding, challenged as irregular and void, was taken under the color of lawful authority; and it would not alter the case even if such action involved some proceeding of an officer or of officers taken under an unconstitutional law. The court would still retain their jurisdiction over the matter and the proceedings. (*Id*)
3. *Third.* An indictment found by a body drawn, summoned and sworn as a grand jury before a competent court and composed of

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good and lawful men fulfill this constitutional guaranty. A jury so framed is a *de facto* jury because selected and organized under the forms of law. A defect in its constitution owing to the invalidity of a law under which a panel is drawn affects no substantial right of one charged with crime, and herein an objection based thereon is not available to him. (*Id.*)

4. *Fourth.* An indictment found by a grand jury of good and lawful men selected and drawn under color of law is a good indictment by a grand jury within the sense of the constitution, although the law under which the selection was made is void (*Reversing S. C.*, 65 *How.*, 365). (*Id.*)

JUSTICES' COURT.

1. Section 3223 of the Code of Civil Procedure "embraces the entire subject of jurisdiction as regards that court, and was plainly intended so to do. Not purporting to amend any former or existing laws in that particular, they are repealed by necessary implication." (*Conor* agt. *Hilton*, ante, 144.)
2. Under its provisions in relation to the "justices' court of the city of Albany," * * * providing that it shall have jurisdiction "within the city where the court is located," the jurisdiction thereof is restricted to the city limits. (*Id.*)
3. Accordingly, *held*, that said court had no power to send process into adjoining towns for service, and that it acquired no jurisdiction by the service of a summons outside of the city (*Geraty* agt. *Reid*, 78 *N. Y.*, 64, *followed*). (*Id.*)

See APPEAL.

Harvey agt. *Van Dyke*, ante, 396.

4. The provision of the Code of Civil Procedure (*sec.* 2957) providing that where a new action is brought in a court of record after the discontinuance of an action before a justice of the peace, because of a plea of title, the complaint must be for the same cause of action only as that relied upon before the justice, does not prohibit the plaintiff from making such cause of action perfect by inserting new allegations necessary for that purpose. (*For* agt. *Erie Preserving Co.*, 93 *N. Y.*, 54.)

5. Where, therefore, the action in the justices' court was against a corporation, but the complaint therein contained no allegation that defendant was a corporation: *Held*, that the insertion of such an allegation in the complaint in the new action brought in the supreme court was proper. (*Id.*)

JUSTICES OF THE PEACE.

1. Justices of the peace are "justices or judges of any court" within the meaning of section 13, article 6 of the constitution. Persons over seventy years of age are ineligible to office. Writ of prohibition is the proper remedy against a person acting as justice of the peace who is over seventy years of age. (*The People ex rel. Lawrence* agt. *Mann et al.*, ante, 337.)
2. The filing and docketing of a transcript of a justice's judgment in the county clerk's office makes it the judgment of the county court; and no action can thereafter be brought upon it in a justice's court, as it is required by section 1913 of the Code of Civil Procedure that the order granting leave to bring such an action shall be made by the court in which such action is to be brought, and that court has no power to grant leave to bring an action upon a

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judgment of a county court. (*Baldwin* agt. *Roberts*, 30 *Hun*, 163.)

3. Where an action for a wrongful injury to personal property is commenced in a justice's court by the service of a summons returnable forthwith, accompanied by an order of arrest, the jurisdiction of the justice does not depend upon the sufficiency of the affidavit upon which the order of arrest was made, but upon the service of the summons, and it still remains though the order be set aside as improperly granted. (*McNeary* agt. *Chase*, 30 *Hun*, 491.)

LANDLORD AND TENANT.

1. Where a tenant hired premises for one year from May one, at a monthly rental, and made default in the payment of the June rent, and was dispossessed in consequence under a warrant issued in summary proceedings founded on such default:

Held, that a deposit made by the tenant to the landlord at the time of the hiring "as security for the faithful performance by the tenant of the covenants on her part contained in the lease," cannot be recovered back. The reasons stated. (*Rice* agt. *Bliss*, ante, 186.)

2. Where a tenant under a yearly hiring dies leaving his widow in possession of the premises, and she remains in occupation during the unexpired term, and there is no administration upon the estate, she is, *prima facie*, an assignee of the term and may be removed as an overholding tenant under the statute relating to summary proceedings. (*Michenfelder* agt. *Gunther*, ante, 464.)

LIMITATIONS (STATUTE OF).

1. An action for a partnership accounting, where the articles are

under seal, is not barred until twenty years. (*Devinelle* agt. *Edy*, ante, 328.)

2. Where the defendant, by the partnership agreement, agreed to pay one-half the losses and expenses, and has failed to do so, and plaintiff, under his partnership liability to third persons, has paid the whole, the basis of an action by plaintiff to recover one-half the sums paid by him is the defendant's covenant to pay over half and its breach. (*Id.*)

MANDAMUS.

1. The statute, chapter 215 of Laws of 1870, entitled "An act to amend an act for the publication of the session laws by two newspapers in each county of the state," declares that "the appointment shall be made in the following manner: Each member of the board of supervisors shall designate by ballot one newspaper printed in the county to publish the laws, and the paper having "the highest" number and the paper having "the next highest" number of votes, shall be the papers designated for printing the laws; provided such papers are of opposite politics and fairly represent the two principal political parties into which the people of the county are divided:"

Held, that when three papers are voted for and the two claimed to have been selected received an equal number of votes, there has been no selection.

Held, further, that a *mandamus* should be granted to compel the board of supervisors of Greene county to designate two papers to publish the session laws. (*Mutter of Hall*, ante, 330.)

2. Where a board of supervisors acting as county canvassers decided that K. and not G. had been elected coroner of Greene county, and gave to him the certificate of election, and K. entered upon and

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performed the duties of such office until ousted from office by judgment of this court in action by the *People ex rel. G.*, to recover possession of the office, K. presented a bill to the supervisors for services and disbursements as coroner, properly verified, which the board audited and incorporated the amount thereof in the tax levy, and issued a certificate to K. for such amount, which was by him assigned to a *bona fide* holder, for value, previous to the institution of this proceeding, which seeks to compel the board to cancel the audit and allowance:

Held, that the *mandamus* asked for should be refused for the following reasons:

First. The board of supervisors by awarding to K. the certificate of election as coroner, authorized and empowered him to act as such, and as such services were valuable and legal, there is no impropriety or illegality in their audit or payment.

Second. As G. cannot obtain an allowance of the same bill from the county, but his remedy, if any he has, is against K., there is no property nor money of the county to be wasted, which gives the relator, as a taxpayer, any standing to maintain the proceedings.

Third. If the audit to K. is illegal it can be reviewed by *certiorari*, or an action brought to recover the money paid thereon, when paid.

Fourth. As the certificate was issued in good faith to K. and was assigned to a *bona fide* holder, for value, before this proceeding was instituted as against such *bona fide* holder, the county is remediless. (*Matter of Deane* agt. *Board of Supervisors*, ante, 461.)

MORTGAGE FORECLOSURE.

1. Where, in an action to foreclose a mortgage given by A., a denial is interposed by B., who is joined with A. as defendant, that his

title or interest is subordinate to that of plaintiffs, as alleged, and he claims possession by a title paramount and adverse to them, the complaint should be dismissed as to B., as the right of possession between A. and B. cannot be settled in a foreclosure action, but must be tried by a jury. (*Meigs et al.* agt. *Willis*, ante, 466.)

MOTIONS AND ORDERS.

1. Motion by plaintiff or claimant to commence an action against G., as receiver of the North River Construction Company, for the foreclosure of a mechanic's lien filed in the clerk's office of Oneida county. On the 14th of January, 1884, this court at special term thereof held in the first judicial district, appointed G. receiver of said construction company in an action brought by one W. a stockholder, against said construction company as defendant. G. had been previously appointed such receiver by a court of chancery of the state of New Jersey. On February 7, 1884, the special term in first district made an order in said W. case, restraining all persons from bringing or prosecuting any such proceedings against the construction company or in any manner interfering with its assets until the further order of the court:

Held, that the motion could not be made until the order of February seventh was vacated or modified. (*Wilkinson* agt. *The North River Construction Co.*, ante, 423.)

2. The order is valid and binds the plaintiff, as claimant in this action, precisely as if he were an actual party to the action in which that order was made. (*Id.*)
3. An application to vacate or modify such order and for leave to sue the receiver might be joined

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- in one motion, but such a motion could only be made in the first judicial district. (*Id.*)
4. Where an order of special term recited that it was made "on reading and filing the decision of the court," referring to an opinion which was the only decision filed, and the minutes of the general term on affirmance of such order stated that it was affirmed on opinion of the judge at special term: *Held*, that the opinion was thus made part of the record, and could be referred to to ascertain the grounds of the decision; and it appearing therefrom that the decision was based upon the ground of a want of power: *Held*, that the order, although a discretionary one, was reviewable here. (*Tolman* agt. *Syr., &c., R. R. Co.*, 92 N. Y., 353.)
 5. Under the Code of Civil Procedure (*sec.* 709), in an action in the supreme court, triable and tried in the first judicial district, an application for an extra allowance of costs must be made in that district, although the justice before whom the cause is tried resides in another district. (*Hunter* agt. *Salter*, 92 N. Y., 651.)
 6. The rule of the supreme court (44), requiring such an application to be made to the court before which the trial is had or the judgment rendered, does not authorize it to be made out of the district. (*Id.*)
 7. An order of a surrogate denying the application of one having no direct or contingent interest in the fund, to intervene in proceedings to compel an executor to pay over a legacy, is in his discretion; it involves no substantial right, and so is not reviewable here. (*In re Halsey*, 93 N. Y., 48.)
 8. So, also, as to an order of the supreme court refusing to stay such proceedings, pending pro-
 - ceedings *de lunatico inquirendo* against the legatee. (*Id.*)
 9. A surrogate has the right to determine the form of his own order, and his order denying an application for a resettlement of a prior order is not reviewable here. (*Id.*)
 10. A surrogate's order requiring an executor to account, and directing a reference to ascertain his place of residence and whether he has an office in the state, is preliminary and not final, and so not reviewable here. (*Id.*)
 11. In an action brought to test the validity of certain town bonds, and to restrain their transfer pending the litigation, the bank of O. was made a defendant. Fictitious names were used to designate defendants, whose names were unknown. Upon an affidavit averring that V. W., the president of said bank, had testified that he at one time owned \$30,000 of said bonds and had disposed of them, and that S., the cashier of said bank, had had the custody of many bonds and knew their owners, an order was obtained for their examination before trial. No official action on the part of the bank was averred, and it was not named either in the affidavit or order as one of the parties to be examined. Neither V. W. nor S. was named as a defendant: *Held*, that the order was properly vacated; that there was no right to examine the officers as such and by virtue of their relation to the bank; that it could not be claimed that they were sued by the fictitious names, or that they were expected to be adverse parties (*Code sec.* 870); and that they could not be examined as witnesses, as no case was made for their examination as such (*Secs.* 872, 882, *subd.* 5). (*Town of Hancock* agt. *First Nat. Bk.*, 93 N. Y., 83)
 12. To sustain an application under

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- the Code of Civil Procedure (*sec.* 682) by one claiming a lien, as an attachment creditor, to vacate a prior attachment, it is necessary for him to establish, by legal evidence, a subsequent valid levy under his attachment upon the same property covered by the prior attachment. (*Tim agt. Smith*, 93 N. Y., 87.)
13. The opinion of his attorney that the subsequent lien has been secured, although put in the form of an affidavit, is not sufficient. (*Id.*)
14. An application to set aside a sale made in pursuance of a judgment, in an equitable action, is addressed to the discretion of the court, and an order, denying the application, where an abuse of this discretion is not shown, is not reviewable here. (*Winter agt. Eckert*, 93 N. Y., 367.)
15. Where, after the denial of a motion to vacate an order of arrest, the defendant renews the motion upon further affidavits, this is a waiver of the right to appeal from the order denying the first motion. (*Harris agt. Brown*, 93 N. Y., 390.)
16. *It seems* the fact that no formal leave to renew a motion on additional papers was granted does not necessarily determine that a second motion made on an order to show cause is not a renewal; the granting the order to show cause, and hearing the second motion on the original and additional papers is, in effect, granting leave to renew, and a renewal. (*Id.*)
17. An order directing a bill of particulars is not reviewable here, unless it clearly transcends the power of the court granting it, as defined by the general course of practice in regard thereto. (*Witkowski agt. Paramore*, 93 N. Y., 467.)
18. The scope of such an order is ordinarily a question of discretion. (*Id.*)
19. Allegations by way of mitigation of damages in an answer in an action to recover damages for injury to the person should not be stricken out on motion unless it is clear that under no possible circumstances could the matter pleaded have the bearing claimed for it. (*Bradner agt. Faulkner*, 93 N. Y., 515.)
20. Where an attempt had been made to levy upon shares of the stock of a foreign corporation owned by a non-resident defendant, by leaving a certified copy of attachment and notice prescribed by said Code (*sec.* 649), with the secretary of the corporation in this state: *Held*, that the defendant was entitled to move to have the levy set aside and vacated; and that an order refusing this relief was reviewable here. (*Pimton agt. Bigelow*, 93 N. Y., 592.)
21. To authorize a review here of an order vacating an attachment, it must appear in the order itself that it was not vacated in the exercise of the discretion vested in the court below. The opinion of that court may not be looked at to ascertain the grounds of the decision. (*Brooks agt. Mex. Nat. Con. Co.*, 93 N. Y., 647.)

NEGLIGENCE.

1. One who licenses or employs others to go on a lofty scaffold is not liable for injuries from the breaking of a plank unless affirmative knowledge of its defects is brought home to him. (*Ditberner agt. Rogers*, *ante*, 35.)
2. The rule in this state is not that laid down in the recent English cases (*Heaven agt. Pender*, 28 Alb. L. J., 143, &c.). (*Id.*)
3. Men loaned by a contractor to a sub-contractor to move planks, &c., as required by the sub-contractor, will not be held to be the

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contractor's men in such sense as to make the contractor liable. (*Id.*)

4. The mayor, aldermen and commonalty of the city of New York should not be held liable for injuries sustained by a person by reason of a defect in the highway in the "annexed district," because they were not guilty of negligence, the duty of keeping in repair the roads, streets and avenues in the annexed district not having been imposed upon them, but exclusively upon the department of parks, without any control by the said corporation. (*Ergholt* agt. *The Mayor*, ante, 161.)

5. VAN BRUNT, J., dissents upon the authority of the case of *Two good* agt. *The Mayor*. (*Id.*)

NEW TRIAL.

1. New trials are only granted where surprise arises in relation to the facts proved, and not where surprises arise in relation to the rulings of the judge upon points of law. (*Anderson* agt. *Market National Bank*, ante, 8.)
2. Where, upon a trial, the plaintiffs had stated they would go to the jury upon the evidence as it then stood, and the court adjourned till the next day for counsel to address the jury, another judge at special term should not grant a new trial for the refusal of the trial judge to open the case the day following and take further evidence, when the witness on the other side upon the same subject has been dismissed the court and had left the state. (*Id.*)
3. The granting of new trials upon the ground of newly discovered evidence is generally, if not universally, confined to cases where the newly discovered evidence has an application to the issues that have been tried, rather than to cases where the new evidence is

alone applicable to an issue that is to be framed hereafter by amendment, and which the court may or may not allow. (*Id.*)

4. The rule is that courts will not grant a new trial unless the newly discovered evidence would probably change the result of the former trial. (*Id.*)
5. Although where the defendant sets up the defense that the demand on which the action was founded "has been bought and sold or received for prosecution" by an attorney and counselor, contrary to the statute (2 R. S., 71 et seq.), the court, and not the jury, are to pass upon the question. If determined against the plaintiff, he must be nonsuited, and if in his favor the jury must be instructed accordingly; yet the plaintiff cannot invoke its aid if he neglects to avail himself of, or to perform, the requirements of this rule, or if he waives the right it confers. (*Gescheidt* agt. *Quirk*, ante, 272.)
6. Where the plaintiff did not request the court to direct the jury to find for him, he cannot complain because the defendant did not deem it to be his duty to move for a nonsuit, and having conceded the affirmative to the defendant the plaintiff was the first to go to the jury, to whom he voluntarily submitted his case and they having found against him, and he must abide by their verdict. (*Id.*)
7. Where such a defense is made out and the question of interest is for the court and not for the jury, an absolute judgment in favor of the defendant, as distinguished from a judgment of nonsuit, is proper. (*Id.*)

See APPEAL.

Grunberg agt. *Blumentahl*, ante, 62.

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8. The defendant was tried and convicted of murder in the first degree, for shooting his sister-in-law on April 20, 1882. There was present at the time of the shooting of the deceased, the defendant and his wife. The defendant was examined in his own behalf and testified that the shooting was accidental, stating in detail how it occurred and what he did and said on that day. It appeared by the testimony of several of the witnesses, and to some extent by the testimony of the defendant himself, that he had been drinking for some days before the commission of the crime, and that he was intoxicated at the time of its commission. The conviction was affirmed by the general term on March twenty-second, and by the court of appeals on July 5th, 1883. On July 11, 1883, the defendant moved for a new trial, under sections 465, 466 and 517 of the Code of Criminal Procedure, upon the ground of newly discovered evidence. The affidavits which were made by public officers attached to the police and prison force of New York, tended to show that the defendant was arrested on April 15, 1882, and committed to prison for three days for intoxication; that at the time of his arrest and while in prison he talked wildly and acted violently so that it was necessary to confine his hands, and that at the time of his discharge he had not fully recovered from the effects of the liquor; that upon the day after his arrest for the homicide the city physician visited him and found him in a highly nervous and excited condition, the result of the excessive use of alcohol; that he complained of being unable to sleep or control himself, which symptoms resulted from the abuse of alcohol and the deprivation of sedatives he had been in the habit of taking; that he was under treatment for these troubles for some two weeks; that in the opinion of the said physician at the time of such examination the mind of the prisoner was in such a condition that he was oblivious of his actions during the week preceding said examination. These facts were not communicated to the defendant's counsel until the latter part of June, 1883: *Held*, that it was not probable that the evidence, if received, would have changed the verdict. That the evidence had not been discovered since the trial within the meaning of the said section, inasmuch as the facts of his arrest, confinement and sickness, must have been known to the defendant, although he might not have known the exact condition, physically and mentally, in which he then was, and that it was his duty to have made these facts known to his counsel if he deemed them important; that the only fact newly discovered was that it might have been of some importance to himself if evidence of these facts had been produced on the trial. That as the condition and mental operations of the defendant were questions necessarily involved upon the trial, the evidence was cumulative. That the failure of the defendant to produce the evidence upon the trial, was due to his want of diligence. (*People* agt. *Hovey*, 30 Hun, 354.)
9. A majority of the court were of the opinion that the order of the special term was not appealable to the general term, but concluded to hear the appeal without finally determining this question, because one of the judges entertained a different opinion and because the case was a capital one. (*Id.*)
10. The provision of the Code of Criminal Procedure (*sec.* 527) providing that "the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence, * * * or that justice requires," is applicable only to the supreme court, and gives

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that court a discretionary power. When in the exercise of that discretion it refuses or grants a new trial its determination is not reviewable here. (*The People* agt. *Boas*, 92 N. Y., 560.)

NEW YORK (CITY OF).

1. The mayor, aldermen and commonalty of the city of New York should not be held liable for injuries sustained by a person by reason of a defect in the highway in the "annexed district," because they were not guilty of negligence, the duty of keeping in repair the roads, streets and avenues in the annexed district not having been imposed upon them, but exclusively upon the department of parks, without any control by the said corporation. (*Ergholt* agt. *The Mayor*, ante, 161.)
2. VAN BRUNT, J., dissents upon the authority of the case of *Twogood* agt. *The Mayor*. (*Id.*)
3. Section 892 of the Code of Criminal Procedure has been repealed or abrogated by the provisions of the consolidation act (*Laws* of 1882, chap. 410), and the filing of the record of conviction of a prisoner on a charge of being a vagrant, by a police justice in the office of the clerk of the general sessions of the peace, is regular. (*Matter of Waters*, ante, 173.)
4. Where a child under sixteen years of age was tried and convicted by the court of special sessions of the city of New York, of petit larceny, and committed by the magistrate to the House of Refuge for the term of three months, and was taken by the sheriff to said House of Refuge, and was there tendered to the superintendent and managers thereof, but the said superintendent and managers refused to receive him, for the alleged reason that he was committed for a specified time, and the sheriff returned the prisoner to the city prison on *habeas corpus*.
Held, that there is no justification for the prisoner's detention in the city prison, and, as the House of Refuge has refused to receive him from the sheriff, that he is entitled to his discharge. (*Matter of Lewinski*, ante, 175.)
5. Is the House of Refuge such an institution as is described in section 4 of chapter 496 of the Laws of 1881, and therefore bound to receive the relator on the commitment of the court of special sessions, *quære*. (*Id.*)
6. A child under the age of fourteen years who is found engaged in the occupation of collecting refuse from any market in a public street in the city of New York, is guilty of an offense punishable under the acts of 1877, and the act of 1881 amending the same, and may be committed by such magistrate to certain incorporated institutions, among which is the New York Catholic Protectory. (*Matter of Serafino*, ante, 178.)
7. A police justice has the power and jurisdiction to so commit. (*Id.*)
8. Such magistrate has the power, under the laws of 1882, to determine the age of the child by personal inspection. He is not obliged to direct an examination by a physician for that purpose. (*Id.*)
9. The court has no power on *habeas corpus* to retry the question of fact on which the findings of a court of original jurisdiction must be presumed to have been predicated. (*Id.*)
10. The New York Juvenile Asylum of the city of New York have power, under the eighteenth section of their charter, in their discretion, to bind out a child who is under the age of fourteen and

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above the age of seven years, and who has been committed to said asylum by a police justice after having been proved by competent evidence to be embraced within the eighteenth section of the act entitled "An act relative to the powers of the common council of the city of New York and the police and criminal courts of said city, approved January 23, 1883." (*Matter of Forsyth, ante, 180.*)

11. Where warrants were granted by a police justice committing two children under fourteen years old as being vagrants, namely, "engaged in the occupation of begging under the pretext of peddling, to wit, Bowery, in said city, at ten forty-five P. M. on the 5th day of April, 1883, and frequenting the company of prostitutes, concert saloons, dance-houses and places of entertainment where spirituous liquors were sold," upon an affidavit made at the hearing before the magistrate stating the ages of the children, respectively, eleven and thirteen, and that they were found by the affiant committing acts of alleged vagrancy, described substantially in the same language as that used in the warrants, and the children were afterwards discharged upon *habeas corpus*:

Held, that the return of the commitment in answer to the *habeas corpus*, and the admission of the facts it contained by the failure to take issue thereon, presented a case, under section 291 of the Penal Code, upon which the court should have remanded the children. (*Matter of Moses, ante, 296.*)

12. The purpose of the writ of *habeas corpus* is not to review trials before a magistrate on questions of vagrancy. (*Id.*)
13. The board of commissioners of the department of public parks, being only a subordinate division of the city government, are not liable to be sued as a corporate en-

tity. (*Rauh agt. Board of Commissioners of the Department of Public Works, ante, 368.*)

14. In an action against such commissioners a demurrer to the complaint should be sustained, notwithstanding an allegation that they are a domestic corporation. (*Id.*)
15. Such allegation not being a matter of fact, but a conclusion of law, the court will judicially take notice of the fact that the defendants constitute a part of the municipal government of this city, and that their powers are defined and limited by the charter of the city and other public statutes in relation to that subject. (*Id.*)

OFFICE AND OFFICER.

See ASSESSMENT.

Dows agt. Village of Irvington, ante, 93.

PARTIES.

1. Where, after action was commenced, the plaintiff was adjudicated a bankrupt and an assignee of his property and estate was appointed:
Held, that the bankrupt had no legal right to maintain the action after the appointment of an assignee; and upon these facts being established the complaint should be dismissed. (*Dessau agt. Johnson, ante, 4.*)
2. The assignee is not absolutely bound to prosecute the action, but if he elects to proceed it must be in his own name and not in that of the bankrupt. (*Id.*)
3. An action which seeks to enjoin payment of money to individuals, cannot be maintained without making them parties to it. (*Smith agt. Crissey, ante, 112.*)

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4. He who is deprived of his property, or of what he claims to be his, is entitled to be heard, and no judgment can be rendered depriving him of that which he claims to be his, without bringing him before the court, which is asked to determine his rights. (*Id.*)
5. Where, during the pendency of proceedings for an accounting instituted by the receivers of an insolvent insurance company, one of the receivers dies, the court has power to make an order reviving and continuing the accounting against his executors and directing them to come into such accounting and stand by such orders and decrees as may be made therein. (*Matter of Columbian Ins. Co.*, 30 Hun, 342.)
6. The stockholders of a bank have no legal right to be made parties to an action brought by a receiver thereof against certain of its directors to recover the damages occasioned by their negligence and misconduct. (*Kimball* agt. *Ives*, 30 Hun, 568.)
7. One to whom commercial paper has been indorsed and who holds it as an agent for the purpose of collection only, cannot maintain an action thereon in his own name. (*Iselin* agt. *Rowlands*, 30 Hun, 488.)
8. The provision of the Code of Civil Procedure (*sec.* 451), authorizing a plaintiff, who is ignorant of the name of a defendant, to designate him in the summons by a fictitious name, implies an action commenced and a defendant sued, or intended to be sued, whose name is unknown; it does not permit the use of such a name applicable to no particular individual, but adopted as an expedient to cover the name of a person whose name is known, who is not sued or intended to be sued at the outset, and thus permit him to be brought in, in case plaintiff discovers, at some later period, that he should have been made a defendant. (*Town of Hancock* agt. *First National Bank*, 93 N. Y., 82.)
9. It seems, that the remedy in such a case is by application to amend the summons, and bring in the newly-discovered party. (*Id.*)
10. In an action brought to test the validity of certain town bonds, and to restrain their transfer pending the litigation, the bank of O. was made a defendant. Fictitious names were used to designate defendants whose names were unknown. Upon an affidavit averring that V. W., the president of said bank, had testified that he at one time owned \$30,000 of said bonds and had disposed of them, and that S., the cashier of said bank, had had the custody of many bonds and knew their owners, an order was obtained for their examination before trial. No official action on the part of the bank was averred, and it was not named either in the affidavit or order as one of the parties to be examined. Neither V. W. nor S. was named as a defendant: *Held*, that the order was properly vacated; that there was no right to examine the officers as such and by virtue of their relation to the bank; that it could not be claimed that they were sued by the fictitious names, or that they were expected to be adverse parties (*Code*, *sec.* 870); and that they could not be examined as witnesses, as no case was made for their examination as such. (*Secs.* 872, *subd.* 5, 882). (*Id.*)
11. Immediately after the entry of a surrogate's decree finally settling the accounts of executors and ascertaining the amounts in their hands, one of them removed from the state, and on his refusal to give security, and with his assent, his letters testamentary were revoked; he thereafter ceased to act as executor or trustee, leaving the

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funds of the estate under the control of the remaining executors. The will vested certain trusts in the executors, not personal or involving the exercise of discretion, but attached to the office. In a subsequent action to compel an accounting by the remaining executors, and to charge them with liability for losses alleged to have been caused through their negligence, it was found that at the time of the removal of said executor the estate had sustained no loss, and that none was sustained by reason of any investment made by him: *Held*, that he was not a necessary party to the action. (*Earle* agt. *Earle*, 93 N. Y., 104.)

PARTITION.

1. An action for partion cannot, under section 1533 of the Code, be maintained except only where actual partition of the property itself can properly be made; and where it appears that such partition could not be made without great prejudice to the owners, the court has no jurisdiction except to give judgment dismissing the complaint. (*Scheu* agt. *Lehning*, ante, 231.)

2. Where A., by his will, gave his widow the income of his real and personal estate for life, provided she should remain his widow, with remainder, upon her death or remarriage, to his four children (one of whom is a minor), in equal shares, reserving to his widow, in case of her marriage, her dower in his estate; and in an action by one of the devisees of the estate in remainder for partition of the realty, a sale was directed as the only mode of division:

Held, that a purchaser at the sale should not be compelled to take title, the case being one where partition cannot properly be made — this notwithstanding the consent of the widow that the property be sold and the value of

her particular estate be ascertained and paid to her, such value not being ascertainable under any rule or practice of the court. (*Id.*)

3. The parties might, however, if the rights of an infant did not intervene, make such a mutual agreement for the disposition of the property and the division of the proceeds as should suit their interests. (*Id.*)

PENAL CODE.

1. Section 15 — Petit larceny is a misdemeanor, and is punishable under this section of the Penal Code by imprisonment in the penitentiary or a county jail for not more than one year, or by a fine of not more than \$500, or both. (*The People* agt. *McTameney*, ante, 70.)

2. Section 291 — Where warrants were granted by police justices committing two children under fourteen years old as being vagrants, namely, "engaged in the occupation of begging under the pretext of peddling, to wit: Bowery, in said city, at ten forty-five P. M. on the 5th day of April, 1883, and frequenting the company of prostitutes, concert saloons, dance-houses and places of entertainment where spirituous liquors were sold," upon an affidavit made at the hearing before the magistrate stating the ages of the children, respectively, eleven and thirteen, and that they were found by the affiant committing acts of alleged vagrancy, described substantially in the same language as that used in the warrants, and the children were afterwards discharged upon *habeas corpus*:

Held, that the return of the commitment in answer to the *habeas corpus*, and the admission of the facts it contained by the failure to take issue thereon, presented a case, under this section of the Penal Code, upon which the court

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should have remanded the children. (*Matter of Moses*, ante, 296.)

PLEADING.

1. This action was brought to recover the damages alleged to have been occasioned by the wrongful acts of the defendants in confederating and conspiring together to prevent the plaintiff from carrying on its business in Buffalo, and to cripple and bankrupt it and prevent it from selling the articles manufactured by it. After setting forth different acts of the defendants tending to establish the cause of action, the complaint alleged, in separate and distinct paragraphs, that the defendants, in pursuance of and to accomplish the purpose of the conspiracy, caused several actions to be commenced against it by another corporation, of which they were the chief executive officers and managers, and in which they were stockholders; that the actions were still pending and were without merit and brought for the purpose of bringing ruin and bankruptcy upon the plaintiff: *Held*, that as there was no averment or pretense that the defendants had resorted to any abuse of the process of law in the prosecution of the actions referred to in the complaint, the allegations relating thereto were irrelevant and should be stricken from the complaint. (*See Buffalo Lubricating Oil Co. agt. Everest*, 30 *Hun*, 586.)
2. A complaint which states facts constituting a good cause of action is not demurrable, simply because the facts are inartificially stated, or because several different causes of action are joined in one count. (*Wetmore agt. Porter*, 92 *N. Y.*, 76.)
3. Nor is a complaint demurrable where the facts stated show that plaintiff is entitled to some relief, because the relief demanded is not precisely that to which the plaintiff is entitled. (*Id.*)
4. The provision of the Code of Civil Procedure (*sec.* 2957) providing that where a new action is brought in a court of record after the discontinuance of an action before a justice of the peace, because of a plea of title, the complaint must be for the same cause of action only as that relied upon before the justice, does not prohibit the plaintiff from making such cause of action perfect by inserting new allegations necessary for that purpose. (*Fox agt. Erie Preserving Co.*, 93 *N. Y.*, 54.)
5. Where, therefore, the action in the justice's court was against a corporation, but the complaint therein contained no allegation that defendant was a corporation: *Held*, that the insertion of such an allegation in the complaint in the new action brought in the supreme court was proper. (*Id.*)
6. Where a complaint alleges that plaintiff is a corporation organized under a law of this state, and the answer simply avers that defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation, plaintiff is not required to prove the corporate existence; such an averment is not equivalent to an "affirmative allegation" that plaintiff is not a corporation, which is requisite to impose upon it the burden of proof (*Chap. 508, Laws of 1875; Code of Civil Procedure, sec. 1776*). (*Con. S. & A. Assn. agt. Read*, 93 *N. Y.*, 474.)
7. *It seems*, that under the provision of the Code of Civil Procedure (*sec.* 536), providing that in an action to recover damages for an injury to person or property, "the defendant may prove at the trial facts, not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer," a

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defendant in such an action is precluded from proving circumstances by way of mitigation only, which are not so set forth. (*Bradner* agt. *Faulkner*, 93 N. Y., 515.)

8. The rules by which the sufficiency of pleading is ordinarily determined, *i. e.*, materiality and relevancy, may not be strictly applied to allegations in an answer of facts by way of mitigation. (*Id.*)

9. Such allegations should not be stricken out on motion, unless it is clear that under no possible circumstances could the matter pleaded have the bearing claimed for it. (*Id.*)

10. In an action for false imprisonment and malicious prosecution, the defendant may allege in mitigation facts tending to show that what he did was done without malice, and that he had a right to suppose there was reasonable cause for his action. (*Id.*)

11. In such an action the illegal arrest complained of was under an attachment, in proceedings instituted under the act of 1858 (*sec. 1, chap. 190, Laws of 1858*), enlarging the powers of boards of supervisors, to punish for an alleged contempt in disobeying a subpoena issued by defendant as chairman of a committee of the board of supervisors of L. county, which committee was engaged in an investigation as to the validity of the title of plaintiff and others to the office of railroad commissioners of a town in that county. The answer set up in mitigation various irregularities and acts of official misconduct on the part of said commissioners; that charges against them because thereof were made to the board of supervisors, in consequence whereof such investigation was instituted, and that defendant issued the subpoena and instituted the attachment proceedings in the belief that the board had jurisdiction and that

said statute authorized the proceedings. The court, on motion, struck out the averments as to the irregularities and misconduct of the commissioners: *Held*, error. (*Id.*)

12. In an action for the alleged wrongful taking and conversion of a quantity of wood, defendant set up as a counter-claim in substance, that he held a bond and a mortgage as collateral upon certain lands which were insufficient security, and the obligor was insolvent; that plaintiff being a second mortgagee in possession of the lands, with knowledge of the facts and with intent to reduce, and deprive defendant of its security, and to defraud it, wrongfully cut the wood in question from the said land, thereby wasting the land, &c., to defendant's damage; that on foreclosure of defendant's mortgage and sale thereunder, a large deficiency was left: *Held*, that defendant's claim was "connected with the subject of the action" within the meaning of the Code of Civil Procedure (*sec. 501*), and so constituted a proper counter-claim. (*Carpenter* agt. *Man. Life Ins. Co.*, 93 N. Y., 552.)

13. Where other parties to an action have an interest in retaining upon the record an answer interposed by one of the defendants, said defendant has not the absolute right to withdraw his answer, but it rests in the discretion of the court whether or not he will be permitted so to do. (*Crushman* agt. *Leland*, 93 N. Y., 632.)

PRACTICE.

1. A claim for the wrongful conversion of a chattel, which is a cause of action arising out of a tort, cannot be set up by way of a counter-claim in an action arising upon contract. (*Bell* agt. *Lesbini*, *ante*, 385.)

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2. Although a motion may be made to vacate an order of arrest on the ground that the affidavits on which the order was granted did not state, as required by Rule 25, whether any previous application had been made for such order, such motion should be made with diligence. (*Schuchne et al. agt Kayser, ante, 395.*)
3. It is not intended in reserving the right of the party arrested to move to vacate the order at any time before final judgment, to include the right to so move for a failure to comply with Rule 25. (*Id.*)
4. It is too late to make such motion after the action is ready for trial. (*Id.*)
5. It is not in every case where the defendant demands in his answer judgment in his favor exceeding fifty dollars that he, as appellant, may demand and have a new trial in the appellate court, but only in those cases where from the nature of the action and the condition of the pleading it can be seen that the demand has some basis in fact or law in its support. (*Harvey agt. Van Dyke, ante, 396.*)
6. An improper pleading cannot be made the basis of a demand for a new trial in the county court, under the Code, applicable to appeals from judgments rendered by justices of the peace. (*Id.*)
7. Where an action was brought in a justice's court in trover for taking and converting a cow, and damages were claimed in the sum of fifty dollars, the defendant answered by general denial, also set up property in himself, demanded judgment for the dismissal of the complaint and for seventy-five dollars damages, &c. Judgment was rendered in favor of plaintiffs for forty-four dollars and twelve cents. The defendant in his notice of appeal to the county court demanded a new trial in that court. The justice's return having been filed the plaintiffs moved thereon for an order transferring the case to the law calendar, and that it be heard on the justice's return without a new trial therein, which motion was denied :
Held, that the practice was correct. It was proper to determine in advance whether the appeal was to be tried on a question of fact or one of law. The county court had jurisdiction to determine that question, and it could do it as well on special motion as at opening of trial. (*Id.*)
8. A party who has brought an action is not precluded from setting up the same matter as a counter-claim in a cross action, but will be compelled to elect between his own suit and the recoupment claimed, and if he elects the latter, his own suit will be stayed. But the rule does not extend so far as to allow a defendant to plead the same counter-claim to three independent actions brought by the same plaintiff. After using the counter-claim in the first action, the plaintiff may, in his reply, in the second and third actions, plead in abatement the fact that such counter-claim has been pleaded in the first action. (*Tuckerman agt. Corbin, ante, 404.*)
9. The defendant should have protected himself by moving to consolidate the actions or to stay the second and third actions until the first action was disposed of. (*Id.*)
10. Where, in an action brought by plaintiff for the recovery of damages for the breach of a contract alleged to have been made by eleven defendants contracting jointly, the answer of three of the defendants denies the making of the contract alleged, but avers that the contract, whatever may have been its terms, was with the three defendants, and in respect to that sets up counter-claims:

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Held, that such counter-claims are tenable and well pleaded under section 1204, Code of Civil Procedure; that these defendants were not concluded by the allegations of the complaint, but could deny the joint liability, aver a several liability as to themselves, and then set up their counter-claims; that the issue as to whether the contract was with all the defendants sued, or those who set up the counter-claims only, is an issue to be determined on the trial of the case, and if it should turn out to be correct, as the answer avers, the counter-claims would be legally applicable to any claim which might exist in favor of the plaintiff under the agreement or agreements (*Affirming S. C.*, 60 *How.*, 498). (*Clegg agt. Cramer, ante*, 411.)

11. Motion by plaintiff or claimant to commence an action against G., as receiver of the North River Construction Company, for the foreclosure of a mechanic's lien filed in the clerk's office of Oneida county. On the 14th of January, 1884, this court at special term thereof held in the first judicial district, appointed G. receiver of said construction company in an action brought by one W., a stockholder, against said construction company as defendant. G. had been previously appointed such receiver by a court of chancery of the state of New Jersey. On February 7, 1884, the special term in said district made an order in said W. case, restraining all persons from bringing or prosecuting any such proceedings against the construction company, or in any manner interfering with its assets until the further order of the court:

Held, that the motion could not be made until the order of February seventh was vacated or modified. (*Wilkinson agt. The North River Construction Company, ante*, 423.)

12. The order is valid and binds the

plaintiff, as claimant in this action, precisely if he were an actual party to the action in which that order was made. (*Id.*)

13. An application to vacate or modify such order and for leave to sue the receiver might be joined in one motion, but such a motion could only be made in the first judicial district. (*Id.*)
14. A receivership in a creditor's suit to sequester the property of a railroad company comes within the spirit and intent of the law of 1883, requiring notice to be given to the attorney-general of all proceedings in an action for the dissolution of a corporation or a distribution of its assets; and such receiver cannot be legally appointed without compliance with this provision. A receiver, in an action to foreclose a mortgage executed by the company, has the right to apply to be relieved from the void order or judgment, if it injuriously affects him in the discharge of his duties, although he has not in any form been made a party to the creditor's action. (*Whitney agt. The N. Y. & Atlantic R. R. Co., ante*, 436.)
15. Subsequent proceedings to subject the attorney-general to the order and judgment appointing and continuing the receiver in the creditors' action without notice to the receiver in the foreclosure action, whose motion to vacate such order and judgment had been heard and submitted, were very improper and they had no practical effect in the case. (*Id.*)
16. The order appointing the receiver in the creditors' action should, in any event, be so limited as to restrict his receivership to the property, contracts and effects of the company, not included in nor incumbered by the mortgage, which is unassailed. (*Id.*)

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17. It is not necessary to give notice to the attorney general, in an application for the appointment of a receiver in a suit, to foreclose a corporate mortgage. (*Id.*)
18. Where, in an action to recover penalties for violation of the excise laws, the complaint charged that the plaintiffs were overseers of the poor, &c., and that the defendant was, on the 12th day of May, 1883, keeper and proprietor of a hotel known as the "Mansion House," in the town named, and on that day at said hotel, in violation of the provisions of chapter 628 of the Laws of 1857, and the statutes amendatory thereof, he "sold strong and spirituous liquors and wines in quantities of less than five gallons at a time, viz., one gill of brandy, one gill of whisky, one gill of gin, one gill of wine, one gill of alcohol, one gill of rum, one gill of ale, one gill of beer, without a license therefor granted according to the provisions of said statutes, whereby defendant became indebted and liable to plaintiffs in the sum of fifty dollars forfeiture and penalty imposed by said statutes." On motion to make the complaint more definite and certain, or for a bill of particulars: *Held*, that the complaint is framed under and according to the rules and requirements of the common law, and is sufficient, as against the objection that the reference to the law under which this action is brought is indefinite and uncertain. As a common-law pleading it is sufficient that the complaint charges in due form and sufficient particularity the commission of the offense declared by the statute, with general reference to the law giving the right of action for the penalty. (*Kee et al. agt. McSweeney, ante, 447.*)
19. An indorsement on the summons referring to the statute is not necessary where service of a copy of the complaint accompanies it:
- Held*, further, that the plaintiffs should either make the complaint more definite and certain by amendment, stating the name and names of the person to whom the sales charged therein were made, or serve on defendant's attorney a bill of particulars giving such information, or in case of inability to give the name and names of such persons, then by stating grounds for the omission. (*Id.*)
20. A county judge can, under section 772 of the Code of Civil Procedure, *ex parte*, vacate an order previously made by him extending time to answer. (*Marks agt. King, ante, 453.*)
21. The stay of proceedings provided for by section 779 of Code of Civil Procedure begins only from the default of the party in not paying the costs. If no time is specified in the order, then this default does not exist until ten days after the service of a copy of the order, and the proceedings, therefore, are not stayed until the ten days have elapsed. (*Id.*)
22. Under section 798, if the service is by mail, double the time is allowed. Does a stay of proceedings prevent the obtaining of further time to answer, *quære*. (*Id.*)
23. An order extending time to answer is equivalent to a notice of appearance. (*Krause agt. Averill, ante, 97.*)
24. A defendant who while seeking release upon *habeas corpus* from imprisonment under a commitment for violation of an injunction on the ground of insufficiency of the commitment itself, is not entitled to be released from a further commitment, immediately succeeding his discharge, for the reason that he was privileged as a party in attendance upon the other proceeding. (*Murad agt. Thomas, ante, 100.*)

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25. Where an assignee has violated no duty, but was removed because his domestic relations were such as to make it probable that his feelings might conflict with his duty, his commissions will be allowed. (*Matter of Schlang, ante, 199.*)
26. The assignee's claim for rent, clerk hire and gas bills paid whilst the stock was selling at retail was properly disallowed. But it was proper to allow such expenses as were incurred in preparing the goods for sale at auction. (*Id.*)
27. It is the duty of the assignee to defend the trust, and to preserve the assigned estate, and it is proper to allow him the amount payable to his counsel for services in a replevin suit. (*Id.*)
28. Where difficult questions arise an assignee may lawfully employ counsel to advise him in relation to the administration of the estate, and charge the expenses to the trust fund. (*Id.*)
29. If a trustee or assignee has good ground for retiring, the costs of the suit by which he seeks and obtains a discharge from his trusteeship will be paid out of the trust fund. (*Id.*)
30. Where, as in this case, an assignee without any fault on his part, is called upon to vacate his office, he stands in the position of one who voluntarily and for good cause seeks to be relieved from his trusteeship. With respect to the expenses of his accounting, he should be treated like a trustee, who, for good reason, and of his own accord, asks leave to lay down his office. (*Id.*)
31. The assignee should not be allowed a payment made of a gas bill which was contracted for by the assignors and was a claim against the assigned estate. Not being a preferred claim, only a *pro rata* portion should have been paid. He should on the final accounting of the substituted assignee be entitled to reclaim the amount which, on a *pro rata* payment to creditors of the non-preferred class would be coming to the gas company. (*Id.*)
32. The costs to be allowed on an accounting of an assignee are such costs as would be awarded on the trial of an issue of fact in a civil action; that is to say, for proceedings after notice and before trial, and the usual trial fee. (*Id.*)
33. An order to show cause which provides that service of a copy on the plaintiff's attorney two days before the return day thereof shall be deemed sufficient service requires *personal service* on the attorney. (*Marcele agt. Saltzman, ante, 205.*)
34. To make service by mail regular, under sections 797 and 798 of the Code of Civil Procedure, the order must provide for service by mail. (*Id.*)
35. The fact that the papers were received more than two days before the return day does not cure the defect. (*Id.*)
36. Although where the defendant sets up the defense that the demand on which the action was founded "has been bought and sold or received for prosecution" by an attorney and counselor, contrary to the statute (2 R. S., 71 *et seq.*), the court, and not the jury, are to pass upon the question. If determined against the plaintiff, he must be non-suited, and if in his favor the jury must be instructed accordingly; yet the plaintiff cannot invoke its aid if he neglects to avail himself of, or to perform, the requirements of this rule, or if he waives the right it confers. (*Gescheidt agt. Quirk, ante, 272.*)

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37. Where the plaintiff did not request the court to direct the jury to find for him, he cannot complain because the defendant did not deem it to be his duty to move for a nonsuit, and having conceded the affirmative to the defendant the plaintiff was the first to go to the jury, to whom he voluntarily submitted his case and they having found against him, and he must abide by their verdict. (*Id.*)
38. Where such a defense is made out and the question of interest is for the court and not for the jury, an absolute judgment in favor of the defendant, as distinguished from a judgment of nonsuit, is proper. (*Id.*)
39. The plaintiffs sued to recover the amount of a promissory note made by the defendant to the order of McS. & Co. and delivered to the plaintiffs. The answer denied each and every allegation in the complaint contained except as thereafter admitted. It then alleges, among other things, that the defendant "gave the plaintiffs a note for \$2,054," and "the note set forth in the complaint was the final renewal of said note." The answer then attacks the consideration of the note and pleads other facts in defense to it:
Held, that the defendant should have been awarded the affirmative of the case and the right of opening and closing to the jury, and the denial was error, for which the judgment should be reversed. (*McShane* agt. *Braender*, ante, 294.)
40. Formerly the people had no right or power to review a decision or judgment favorable to a prisoner. The right to do so depends upon statute. Under section 518 of the Code of Criminal Procedure an appeal to the supreme court can be taken by the people in two cases only: 1st. From a judgment for the prisoner on a demurrer to the indictment.
- 2d. From an order of the court arresting judgment. (*The People* agt. *Dempsey*, ante, 371.)
41. An order of the oyer and terminer setting aside a grand jury and quashing an indictment is not reviewable in the supreme court. (*Id.*)
42. The general term of the supreme court can correct errors and mistakes in criminal cases only when brought before it pursuant to statute. (*Id.*)
43. In an action to foreclose a mortgage the summons was served upon the unknown heirs of one Ringland, the owner of the equity of redemption, under an order made in pursuance of subdivision 5 of section 135 of the Code of Procedure, as amended in 1860. It was granted upon an affidavit made by the plaintiff's attorney, which stated no reason why it was not made by the plaintiff. It stated the death of Ringland; that the deponent had made diligent search and inquiry for his heirs-at-law and next of kin, but had been unable to find any of them or any of his relations; that he had visited Ringland's former neighbors and could only hear that he once had a sister, but could not find out her name or residence: *Held*, that the affidavit thus made by the attorney, was defective in that it did not show that the names or residences of the parties in interest were unknown to the plaintiff, and in that it failed to state the sources from which the attorney's information was derived. (*Piser* agt. *Lockwood*, 30 Hun, 6.)
44. That the title acquired at a sale under a judgment of foreclosure entered in the action, was so defective that a purchaser should not be compelled to accept it. (*Id.*)
45. A judgment creditor cannot maintain an action to have a chat-

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- tel mortgage executed by his debtor declared fraudulent and void, where the latter has executed, after the execution of the mortgage and before the recovery of the judgment, a general assignment for the benefit of his creditors. (*Childs* agt. *Kendall*, 30 *Hun*, 227.)
46. Where a summons was served upon a non-resident infant defendant in a foreclosure action, under the provisions of section 135 of the old Code, it was sufficient if, in addition to the required publication, a copy of the summons and complaint were deposited in the post-office directed to the infant at its place of residence. Personal service of the papers upon the infant, or service by mail or personally upon its father, mother or guardian, was unnecessary. (*Home Ins. Co.* agt. *Head*, 30 *Hun*, 405.)
47. Returns to this court should be made by a responsible officer, under sanction of his official oath, and attorneys for parties cannot, by stipulation, make up a case for the court. (*Dow* agt. *Darragh*, 92 *N. Y.*, 537.)
48. A preference on the calendar of an action for dower, authorized by the Code of Civil Procedure (*sec.* 791, *subd.* 6), can be claimed only when the proof required, *i. e.*, that plaintiff "has no sufficient means of support aside from the estate in controversy," was made, and an order allowing the preference obtained as required (*sec.* 793), before the notice of argument was served. (*Bartlett* agt. *Musliner*, 92 *N. Y.*, 646.)
49. Where, in an action in which the people were parties, and appeared by the attorney general, the latter did not, at the time of serving notice of argument, give notice of a particular day in the term on which he would move it, as prescribed by the provision of the Code of Civil Procedure (*sec.* 791, *subd.* 1), to entitle the cause to a preference, but served with the notice of argument notice of motion that the cause be set down for a day named, which motion failed because the court adjourned before the day specified for making it: *Held*, that the action was not entitled to a preference. (*People ex rel.* agt. *Kinney*, 92 *N. Y.*, 647.)
50. Under the Code of Civil Procedure (*sec.* 709), in an action in the supreme court, triable and tried in the first judicial district, an application for an extra allowance of costs must be made in that district, although the justice before whom the cause was tried resides in another district. (*Hun* agt. *Salter*, 92 *N. Y.*, 651.)
51. While, where a complaint shows no cause of action, the granting of a preliminary injunction is an error of law, which may be reviewed in this court on appeal, the case must be very clear to justify the court in deciding the merits of the controversy on a mere motion; and where a doubtful question of law arises on the complaint, the decision thereof should be deferred until a hearing of the case upon its merits. (*Selchow* agt. *Baker*, 93 *N. Y.*, 59.)
52. The provision of the Code of Civil Procedure (*sec.* 451), authorizing a plaintiff, who is ignorant of the name of a defendant, to designate him in the summons by a fictitious name, implies an action commenced, and a defendant sued, or intended to be sued, whose name is unknown; it does not permit the use of such a name applicable to no particular individual, but adopted as an expedient to cover the name of a person whose name is known, who is not sued or intended to be sued at the outset, and thus permit him to be brought in, in case plaintiff discovers, at some later period, that he should have been made a defendant.

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(*Town of Hancock* agt. *First Nat. Bk.*, 93 N. Y., 82.)

53. *It seems*, that the remedy in such a case is by application to amend the summons, and bring in the newly-discovered party. (*Id.*)

54. Where other parties to an action have an interest in retaining upon the record an answer interposed by one of the defendants, said defendant has not the absolute right to withdraw his answer, but it rests in the discretion of the court whether or not he will be permitted so to do. (*Cushman* agt. *Leland*, 93 N. Y., 652.)

PREFERENCE.

1. Where, as in this case, while the facts do not appear upon the pleadings, that an order of arrest has been granted, it is apparent that the action is one in which such an order can be issued as a matter of right upon a proper application to the court, even within the provisions of section 793 it may fairly be said that the right to the preference depends upon facts appearing in the pleadings, upon which the cause is to be tried and heard, and therefore that service of a notice of a trial before making the application for a preference does not deprive the defendant of the right to such preference under the rules of practice of the court. (*Smith et al.* agt. *Keepers*, ante, 474.)

2. An inherent right to control its own calendar is vested in the court independent of all other considerations (*Robertson* agt. *Schelhass*, 62 How., 489, and *City National Bank of Dallas* agt. *National Park Bank*, 62 How., 495, distinguished). (*Id.*)

RAILROADS.

1. When there is no dispute as to the parties entitled to receive the

compensation awarded by a commission for property sought to be taken, nor disability to receive it, the court has no power to order a deposit of the sum awarded, or any part thereof, during an appeal to be taken by the railroad company from such appraisal. (*Matter of Saratoga and Schenectady Railroad Co.* agt. *Schenectady Store Co.*, ante, 43.)

2. The plaintiff, who is owner of premises at the corner of Greenwich and Rector streets, in the city of New York, and the owner of an easement in Greenwich street, that it shall be held by the city as a public street forever for the free and common use of all persons, and who also owns the fee of one-half of Rector street, adjoining his premises, is entitled, no matter when he became owner of the premises, to judgment restraining the defendants from continuing the use without compensation, of his property, by operating an elevated railroad upon the streets in front thereof, if the railroad structure, as erected and used, is inconsistent with the free use of the streets under the conditions of the grant to the city. (*Glover* agt. *Manhattan Railway Co.*, ante, 77.)

3. The elevated railroad structure of defendants in Greenwich street is to some extent inconsistent with such use of the street, as it prevents free access to plaintiff's lot, obscures the light and to some extent the free circulation of air, and plaintiff is entitled to damages, for the period of his ownership, for the use of his property thus appropriated by defendants. (*Id.*)

REAL ESTATE.

See CONTRACT.

Emerson agt. *Roof*, ante, 125.

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REFEREE.

1. Where a referee has made his report within the statutory time and on the fifty-ninth day after submission of the cause, notifies the plaintiff's or defendant's attorneys that his report is ready and at their disposal, and also notifies them of the amount of his fees, it should be deemed a sufficient delivery to prevent the forfeiture of his fees, or the termination of the reference under section 1019 of Code of Civil Procedure. (*Thornton* agt. *Thornton*, ante, 119.)

REFERENCE.

1. In an action brought by an attorney for services, the complaint contained a single count alleging such services generally, and the bill of particulars furnished by plaintiff specified numerous items extending through a period of four years; the answer admitted generally that the plaintiff performed services for defendant "during the term and as stated in the complaint," but with that exception denied the complaint and alleged payment, and that the services were performed negligently. The plaintiff having moved for a reference, the defendant admitted that the items of plaintiff's bill of particulars were correctly stated as to their number and date and character of service, but not as to their value:

Held, that all the items of the account, their nature and value must be proved, and the trial would involve the examination of a long account and was referable.

Held, also, that the action was one which the county court had power to refer in its discretion, and the order being discretionary, the supreme court cannot review it on appeal. (*Stebbins* agt. *Cowles*, ante, 28.)

2. Where, in an action by an attorney for services germane to one

subject of litigation and rendered under one retainer, although the specific acts were numerous, no issue is made upon the rendition of the services, but only upon their value, the trial will not require the examination of a long account so as to call for a compulsory reference. (*Hull* agt. *Allen*, ante, 124.)

3. Where, in an action brought in a county court by an attorney, to recover for professional services rendered to his client, the court decides, after a partial trial, that all the items of his account, and their nature and value must be proved, and directs the action to be referred, the order of reference being discretionary with the county court, cannot be reviewed by this court upon appeal. (*Stebbins* agt. *Cowles*, 30 *Hun*, 623.)

4. This rule does not apply to a review by the general term of the supreme court of the decisions of a special term thereof, they being part of the same court, but the county court, being an independent tribunal, this court cannot interfere with the exercise of its discretionary powers. (*Id.*)

5. The supreme court has power in the first instance to order the fees of a referee, appointed to take proofs and report as to the claims of a receiver of an insolvent life insurance company for compensation and expenses, to be paid directly out of the fund. (*Att'y-Gen'l* agt. *Cont'l Life. Ins. Co.*, 93 *N. Y.*, 45.)

6. By the interlocutory judgment herein, defendants, as executors and trustees were held jointly liable for losses occasioned by improvident investments made by J., a son of the testator, who, with their acquiescence and assent, had taken the whole control and management of the estate. A referee was appointed to take the accounts. Upon the hearing before the ref.

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eree, W., one of the trustees, proved that his co-trustee had alone executed satisfaction-pieces of a large number of mortgages belonging to the estate, and delivered them to J., to enable him to receive payment, and claimed he should not be charged therewith: *Held*, untenable; that as the question had already been passed upon by the interlocutory judgment, the referee was controlled thereby and was charged with the duty only of taking the account on the basis thereof. (*Earle* agt. *Earle*, 93 N. Y., 104.)

7. After a referee had made his report in favor of plaintiff, the latter, as a consideration of its delivery, executed an agreement, giving to the former a first lien, for his fees, "upon the judgment and claim of the plaintiff," the same to be paid "out of the first moneys collected * * * upon said judgment or any subsequent judgment that may be recovered." Both plaintiff and the referee knew at the time that defendant intended to appeal: *Held*, that the referee was disqualified from settling the case; that plaintiff having, by his own act, thus created the disqualification, and amendments having been served to the case as proposed, he was not entitled, as of course, to the benefit of the provision of the Code of Civil Procedure (*sec.* 997) which, in case of disability of a referee, permits the court to prescribe the manner of settling the case; but that an order setting aside the report and judgment entered thereon was in the discretion of the court, and so was not reviewable here. (*Leonard* agt. *Mulry*, 93 N. Y., 392.)

REMOVAL OF CAUSE.

See EXAMINATION BEFORE TRIAL.
Fogg agt. *Fisk*, *ante*, 343.

REPLY.

1. A plaintiff cannot, in his reply, plead an independent counter-claim to a counter-claim set up by the defendant. (*Cohn et al.* agt. *Husson*, *ante*, 150.)

REVIVAL.

1. Where the court upon a motion made under section 757 of the Code of Civil Procedure, orders an action brought by a sole surviving executor, who has since died, to be revived, and an administrator with the will annexed to be substituted in the place of the deceased executor, it may direct that his name be substituted in the record and pleading, and that the pleadings, proceedings and evidence already had and taken, stand as the pleadings, proceedings and evidence in the cause so revived. (*Wood* agt. *Flynn*, 30 *Hun*, 444.)

SERVICE (AND PROOF OF).

1. Under section 440 of the Code of Civil Procedure, providing for the service of a summons upon a non-resident, it is sufficient if the order directs the service to be made by publication and by depositing the proper papers in the post-office. It is not necessary that it should also provide that the service may, at the option of the plaintiff, be made on the defendant personally without the state. (*O'Neil* agt. *Bender*, 30 *Hun*, 204.)
2. Under the provisions of the Code of Civil Procedure (*sec.* 638), requiring the service of the summons, in an action wherein an attachment has been granted, "within thirty days after the granting thereof," when the thirtieth day comes on Sunday it must be excluded, and a service upon

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the next day meets the requirement (*Sec. 788*). (*Gribbon agt. Freel, 93 N. Y., 93.*)

SET-OFF.

1. The lien of an attorney on a judgment recovered for the amount of his costs, &c., is well settled and has been regarded as an equitable assignment of the judgment to him. (*Naylor agt. Lane, ante, 400.*)
2. Where costs only are awarded to protect his rights he is bound to give notice of lien. But where, as in this case, notice was given, no settlement of the litigations between the parties themselves by set-off or otherwise will be allowed which defeats the lien of the attorney. (*Id.*)

SHERIFF.

1. The provisions of sections 1421 to 1425 authorizing the substitution of sureties to the relief of the sheriff, sued for wrongful levy or attachment, are unconstitutional and void. (*Hein agt. Davidson, ante, 354.*)
2. Where a sheriff has been discharged from liability under an order of arrest by the justification and allowance of bail as prescribed by the Code of Civil Procedure (*secs. 580, 581*), the court has no power to renew his liability. (*Lewis agt. Stevens, 93 N. Y., 57.*)
3. Where, therefore, a notice of justification was duly served, and plaintiff not appearing, the bail was approved by default: *Held*, that the court had no power to open the default. (*Id.*)

SHERIFF'S FEES.

1. Where an attachment is vacated, the sheriff will not be required to

deliver the attached property to the defendant unless his costs, charges and expenses are paid. (*Hall et al. agt. United States Reflector Co., ante, 31.*)

2. Where, in an order vacating an attachment the plaintiff is directed to pay the sheriff's fees, such payment will not be enforced by precept against the person as for contempt. (*Id.*)
3. Whether the court can, upon motion, determine which of the parties shall pay the sheriff's charges, *quære?*
4. A sheriff has a lien for his costs, charges and expenses upon property remaining in his hands after vacation of the attachment under which he seized the same, and he may sustain an action to enforce the same by a sale of the property (*Hall agt. United States Reflector Co., ante, 31, approved.*) (*Bowce agt. United States Reflector Co., ante, 41.*)

SPECIFIC PERFORMANCE.

1. Where the alleged defects in the title were well known to both parties at the time of the contracting for the sale, and negotiations were entered into in respect to such alleged defects, and an agreement was executed which left it optional with the vendor whether she would bring an action for specific performance or not, and the vendee did reject the title on a tender of a deed to him, and the vendor subsequently elected not to bring an action for a specific performance by the vendee:
Held, that this put the vendee in default and he cannot bring a suit in equity to compel the vendor to give a full and perfect title. (*Emerich agt. White, ante, 154.*)

2. Where any rights, which the vendee may have arising out of the transaction, can be protected by an action at law, specific perform

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ance ought not to be decreed. (*Id.*)

STAY OF PROCEEDINGS.

1. The stay of proceedings provided for by section 779 of Code of Civil Procedure begins only from the default of the party in not paying the costs. If no time is specified in the order, then this default does not exist until ten days after the service of a copy of the order, and the proceedings, therefore, are not stayed until the ten days have elapsed. (*Marks* agt. *King*, ante, 453.)
2. Under section 798, if the service is by mail, double the time is allowed. Does a stay of proceedings prevent the obtaining of further time to answer, *quære*. (*Id.*)

See ANSWER.

Hule agt. *Swinburne*, ante, 387.

3. Where, after the commencement of an action in the superior court of New York city to recover the amount of interest coupons upon bonds secured by a trust mortgage, the trustee commenced an action in the supreme court to foreclose the mortgage for the benefit of all the bondholders, who, including the plaintiff in the former action, were made parties: *Held*, that the supreme court had the power, in its discretion, to stay the proceeding in the superior court suit until the determination of the foreclosure suit. (*Cushman* agt. *Leland*, 93 N. Y., 652.)

SUMMARY PROCEEDINGS.

1. Where a tenant hired premises for one year from May one, at a monthly rental, and made default in the payment of the June rent, and was dispossessed in consequence under a warrant issued in

summary proceedings founded on such default:

Held, that a deposit made by the tenant to the landlord at the time of the hiring "as security for the faithful performance by the tenant of the covenants on her part contained in the lease," cannot be recovered back. The reasons stated. (*Rice* agt. *Bliss*, ante, 186.)

2. Where a tenant under a yearly hiring dies leaving his widow in possession of the premises, and she remains in occupation during the unexpired term, and there is no administration upon the estate, she is, *prima facie*, an assignee of the term and may be removed as an overholding tenant under the statute relating to summary proceedings. (*Michenfelder* agt. *Gunther*, ante, 464.)

SUMMONS.

1. When the allegations in the papers on which an order for the service of a summons by publication was issued was as follows: The affidavit alleged "that as deponent is informed and believed that the defendants are not residents of this state, but reside in the city of Laredo, state of Texas, as deponent is informed by defendants themselves in letters received from them at said place." Also, "that deponent has caused a summons and complaint to be issued in this action against the said defendants to the sheriff of the city and county of New York, but that said defendants cannot be found, after due diligence, within this state, and that deponent is informed and believes that said defendants are now in the city of Laredo, state of Texas." The complaint states that the defendants are, and at all times herein-after mentioned were, copartners, doing business in the city of Laredo, state of Texas, under the firm name of Tomas Dwyer & Co. :

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Held, that this was not sufficient under section 439 of the Civil Code of Procedure, to authorize the granting of this order. (*Greenbaum* agt. *Dyer*, ante, 266.)

2. Proceedings will be upheld when taken in good faith, in the absence of any affirmative evidence disproving the facts alleged, if the original papers contained evidence calling for the exercise of the judgment of the officer who is required in the first instance to determine their sufficiency. (*Donnelly* agt. *West*, ante, 428.)
3. Where a court or officer has such a degree of evidence before him as fairly to require the exercise of judgment upon its weight and effect, an erroneous conclusion simply renders his act voidable but not void. When the proof has a legal tendency to make out a proper case in all its parts for using the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. (*Id.*)
4. In an action for a limited divorce the plaintiff stated in her affidavit that the summons was issued on or about March twenty-eight last, that she is informed by her attorney and verily believes that diligent efforts have been made to serve the same on the defendant, but that he cannot be found within this state and that personal service, for that reason cannot be made within this state. She then avers that prior to and at the time of issuing the summons, the defendant resided in the city of New York, but that since such time she has been informed by the defendant, by a letter received from him, that he has gone to Greenwich, Connecticut, to reside, and that he resides there, and that deponent has also been informed by others, and believes, that the defendant is boarding and

staying at Greenwich, and as deponent is informed and believes he is remaining there to avoid the service of the summons on him. That defendant has a dwelling-house which he has heretofore long occupied as a residence in the city of New York and a large amount of property in that city, and that he is the husband of deponent, and that she separated from him because of his ill-treatment of deponent at the city of New York, and his refusal to support her, and that this action is brought for a limited divorce, and to obtain a decree or judgment for a separation and for a separate support and maintenance, and that the place of trial is in Chemung county. And deponent further says that a good cause of action exists against this defendant and for which this action is brought. Accompanying this affidavit are two affidavits by parties employed, stating the efforts which they had made to serve the defendant within this state.

Held, that the facts stated in these affidavits is evidence sufficient to justify the judge in his conclusion as to the non-residence of the defendant, and as to his having departed from the state with the intent to avoid the service of the summons, and there certainly was some evidence that the defendant could not, with due diligence, be found or served within the state. (*Id.*)

5. While it is necessary for the affidavit to show facts constituting a cause of action, it is not necessary to give all the evidentiary facts. The resultant facts are sufficient, if stated in the affidavit, to give the court jurisdiction:
Held, that the affidavit of plaintiff sets forth the resultant facts, to wit: That in consequence of his ill-treatment of her and his refusal to support her at the city of New York, she separated from him and that this action is brought for that reason.

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- Held*, further, that there is enough in the affidavit to bring the case within one or both of the provisions of 3 Revised Statutes, page 157, which permits a separation for the cruel and inhuman treatment by the husband of his wife, and also "for such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him.
- Held*, also, that there was in this case evidence before the judge who made the order for publication (though slight), tending to show that both parties were in legal contemplation inhabitants of this state at the time of the commencement of this action in which the plaintiff was appointed sequestrator. (*Id.*)
6. Although it might be that on an application directly to open the judgment in the case of *West* agt. *West*, the court would deem that the affidavit on which the order of publication was based, was not sufficiently specific, yet in this action the record of this judgment is *prima facie* evidence and must be held conclusive until clearly and explicitly disproved. (*Id.*)
 7. Since the amendment of 1879, of section 439 of the Code of Civil Procedure, providing for order for publication of summons to be served on a non-resident defendant, the actual presentation of the particular verified complaint to the judge is unnecessary. Where there is a verified complaint on file in the county clerk's office and the affidavit presented for the order of publication sets forth such fact and annexes a copy thereof, it is sufficient. (*McCully et al. agt. Heller et al., ante, 468.*)
 8. A clerical error in the order of publication, *i. e.*, mistake in the first name of one of the defendants, "Albert instead of Alfred," where the affidavits and the copies of order, also summons and notice served on defendant, contain the correct name, is not sufficient to vitiate the service. (*Id.*)
 9. Nor is the omission of the words "without the state," from the notice, sufficient to render the service void. (*Id.*)
 10. When the summons and complaint are served on the defendants personally, without the state, a copy need not be mailed to them. (*Id.*)
 11. Service of a summons upon a non-resident infant defendant in partition not necessary, provided the infant voluntarily appear in the action by its guardian *ad litem* (*Sec. 440, Code, construed*). (*Thistle et al. agt. Thistle et al., ante, 472.*)
 12. The insertion of the words "by publication" instead of the words "without the state of New York," in the notice indorsed upon the summons served personally without the state, under an order of publication, is not a valid objection to title—it is not jurisdictional (*Sec. 443, Code*). (*Id.*)
 13. The provision of the Code of Civil Procedure (*sec. 451*) authorizing a plaintiff, who is ignorant of the name of a defendant, to designate him in the summons by a fictitious name, implies an action commenced, and a defendant sued, or intended to be sued, whose name is unknown; it does not permit the use of such a name applicable to no particular individual, but adopted as an expedient to cover the name of a person whose name is known, who is not sued or intended to be sued at the outset, and thus permit him to be brought in, in case plaintiff discovers, at at some later period, that he should have been made a defendant. (*Town of Hancock agt. First Nat. Bank, 93 N. Y., 82.*)

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14. Under the provision of the Code of Civil Procedure (*sec.* 638), requiring the service of the summons, in an action wherein an attachment has been granted, "within thirty days after the granting thereof," when the thirtieth day comes on Sunday it must be excluded, and a service upon the next day meets the requirement (*Sec.* 788). (*Gribbon agt. Freel*, 93 N. Y., 93.)

15. Where a summons issued out of the marine court of the city of New York, in an action wherein an attachment and order directing service by publication was granted, stated the time within which defendant was required to answer at six days, instead of ten, as required by the Code of Civil Procedure (*sec.* 3165, *subd.* 2): *Held*, that the defect was not a jurisdictional one, but an irregularity, merely; that the court obtained jurisdiction of the action from the time of granting the attachment (*Code*, *sec.* 416); that the summons, therefore, was amendable (*sec.* 723); and that an order amending it *nunc pro tunc* was properly granted. (*Id.*)

SUPERVISORS.

1. The statute, chapter 215, Laws of 1870, entitled "An act to amend an act for the publication of the session laws by two newspapers in each county of the state," declares that "the appointment shall be made in the following manner: Each member of the board of supervisors shall designate by ballot one newspaper printed in the county to publish the laws, and the paper having "the highest" number and the paper having "the next highest" number of votes, shall be the papers designated for printing the laws; provided such papers are of opposite politics and fairly represent the two principal political parties into which the people of the county are divided":

Held, that when three papers are voted for and the two claimed to have been selected received an equal number of votes, there has been no selection.

Held, further, that a *mandamus* should be granted to compel the board of supervisors of Greene county to designate two papers to publish the session laws. (*Matter of Hall*, *ante*, 330.)

2. Where a board of supervisors acting as county canvassers decided that K. and not G. had been elected coroner of Greene county, and gave to him the certificate of election, and K. entered upon and performed the duties of such office until ousted from office by judgment of this court in action by the *People ex rel. G.*, to recover possession of the office, K. presented a bill to the supervisors for services and disbursements as coroner, properly verified, which the board audited and incorporated the amount thereof in the tax levy, and issued a certificate to K. for such amount, which was by him assigned to a *bona fide* holder, for value, previous to the institution of this proceeding, which seeks to compel the board to cancel the audit and allowance:

Held, that the *mandamus* asked for should be refused for the following reasons:

First. The board of supervisors, by awarding to K. the certificate of election as coroner, authorized and empowered him to act as such, and as such services were valuable and legal, there is no impropriety or illegality in their audit or payment.

Second. As G. cannot obtain an allowance of the same bill from the county, but his remedy, if any he has, is against K., there is no property nor money of the county to be wasted, which gives the relator, as a taxpayer, any standing to maintain the proceedings.

Third. If the audit to K. is illegal it can be reviewed by *certiorari*, or an action brought to

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recover the money paid thereon, when paid.

Fourth. As the certificate was issued in good faith to K., and was assigned to a *bona fide* holder, for value, before this proceeding was instituted as against such *bona fide* holder, the county is remediless. (*Matter of Dean* agt. *Board of Supervisors of Greene County*, ante, 461.)

SUPPLEMENTARY PROCEEDINGS.

1. A judgment debtor who has been served with an order for appearance and examination in proceedings supplementary to execution, which forbids him from transferring any of his property until further directions, is not guilty of contempt in applying his earnings, for services rendered within sixty days of the commencement of the proceedings, to the support of his family. (*Hancock* agt. *Sears*, 93 N. Y., 79.)
2. The Code of Civil Procedure does not authorize any interference with such earnings (*sec.* 2463), and it is not necessary for the debtor to procure permission of the court or judge before making the application. (*Id.*)
3. The provision of said Code requiring that the facts constituting the exemption shall be made to appear by the oath of the debtor or otherwise is answered by putting upon the debtor the burden of justifying the use of his earnings when called upon to transfer the money to the sheriff or a receiver (*Sec.* 2447). (*Id.*)

STATE SENATE.

See CONTEMPT.

Matter of McDonald, ante, 487.

STATUTES.

1. The statute, chapter 215 of Laws of 1870, entitled "An act to amend an act for the publication of the session laws by two newspapers in each county of the state," declares that "the appointment shall be made in the following manner; Each member of the board of supervisors shall designate by ballot one newspaper printed in the county to publish the laws, and the paper having "the highest" number and the paper having "the next highest" number of votes, shall be the papers designated for printing the laws; provided such papers are of opposite politics and fairly represent the two principal political parties into which the people of the county are divided."

Held, that when three papers are voted for and the two claimed to have been selected received an equal number of votes, there has been no selection:

Held, further, that a *mandamus* should be granted to compel the board of supervisors of Greene county to designate two papers to publish the session laws. (*Matter of Hall*, ante, 330.)

SURETIES ON APPEAL.

1. After two sureties, A. and B., had executed a joint and several undertaking under sections 334 and 338 of the old Code for a stay of proceedings on appeal, A. justified, but when subsequently B. was examined, the justice before whom the examination took place filed a memorandum that he was not qualified, and that defendant in the action must produce another surety. Meantime, intermediate the filing of the memorandum and the entry of an order thereon, the defendant executed the undertakings upon which this action was brought, which were approved:

Held, that by the memorandum

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and order referred to, the justice approved of A. as one of the sureties upon the undertakings; that it was not necessary that A. should join in the execution of the undertakings with defendant, and even if A. is not liable upon his undertaking for want of a formal indorsement of approval upon it, the defendant should not be relieved from liability on his undertakings, which stayed plaintiff's proceedings. (*Hooker agt. Townsend, ante, 349.*)

TAXES AND ASSESSMENTS.

1. A foreign firm, doing business in Liverpool, England, and having a resident member in New York carrying on the business tributary to the business in Liverpool, such business being buying and receiving property, the products of other states, for sale in England and Europe, and having money here (though temporarily) for the purpose of use and investment in said business, is liable, under the act of 1855, to taxation on the sums invested in their business in this city (*Laws of 1855, chap. 37.*) (*Matter of McMahon, ante, 190.*)

2. The relator P. H. was assessed upon the assessment-roll of the city of Kingston for the year 1883, for real estate valued thereon at \$40,000 and personal property to the amount of \$10,000. The owner of the property (which consisted of a brewery, and the real and personal property connected therewith) was J. H., who resided in the city of New York, and the relator P. H. was in the actual possession of the entire property, real and personal, and conducted and carried on the brewery under a power of attorney from the owner. Upon *certiorari* to review the assessment:

Held, that the assessment of the real estate to the relator was lawful and proper. It was not necessary that such real estate should be

assessed to the relator "as lands of a non-resident."

Held, also, that the assessment of the personal property to the relator was valid. It could not be assessed to any other person, and it was not necessary to add to the relator's name the word "agent." (*The People agt. Bug, ante, 242.*)

TITLE.

1. Where a wife does not join with her husband in a mortgage upon realty and is not made party to the foreclosure of such mortgage, she has an inchoate right of dower in said premises after sale upon the foreclosure judgment, although, after the filing of the *lis pendens* in the foreclosure action and before the entry of the judgment, a deed from the husband to A. of said premises, purporting to have been made three years previously, and taken subject to the mortgage, was recorded in the same office, and that thereafter, and before the entry of judgment, a deed of said premises from A. to the wife, subject to said mortgage, was also recorded in the same office; and the purchaser at the foreclosure sale cannot be required to complete his purchase, the title not being good. (*The People agt. Knickerbocker Life Ins. Co., ante, 115.*)

TRIAL.

1. A request to the court on trial to rule as to the order in which counsel shall address the jury can only properly be made after the whole evidence has been presented. (*Mead agt. Shea, 92 N. Y., 122.*)

2. In an action brought against a sheriff for the alleged unlawful taking and conversion of certain goods, in which defendant justified under executions against H., plaintiff's vendor, claiming that the sale was fraudulent as against

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- the creditors of H., the court charged in substance that if H., in making the sale, intended to defraud his creditors, and plaintiff had "notice of facts in the case which would awaken the suspicion of a man of ordinary intelligence and caution, and which, if acted upon and investigated by him, would have enabled him to have known that the vendor had a fraudulent intent," he would be chargeable with knowledge thereof: *Held*, error; that the question should have been whether the vendee did in fact know or believe the vendor intended to defraud his creditors, not whether he was negligent in failing to discover the fraudulent intent. (*Parker* agt. *Conner*, 93 N. Y., 118.)
3. Where a complaint alleges that plaintiff is a corporation organized under a law of this state, and the answer simply avers that defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation, plaintiff is not required to prove the corporate existence; such an averment is not equivalent to an "affirmative allegation" that plaintiff is not a corporation, which is requisite to impose upon it the burden of proof (*Chap. 508, Laws of 1875; Code of Civil Procedure, sec. 1776*). (*Con. S. and A. Assn.* agt. *Read*, 93 N. Y., 474.)
4. *It seems*, that under the provision of the Code of Civil Procedure (*sec. 536*), providing that in an action to recover damages for an injury to person or property, "the defendant may prove, at the trial, facts, not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, *if they are set forth in the answer*," a defendant in such an action is precluded from proving circumstances by way of mitigation only, which are not so set forth. (*Bradner* agt. *Faulkner*, 93 N. Y., 515.)
5. Plaintiffs shipped, by defendant's road at W., eighteen boxes of jewelry, to be transported to New York "under a contract by which the transportation was at 'the owner's risk.'" The evidence tended to show that, owing to inefficient facilities or accumulation of freight, from three to six days more than the usual time was taken in the transportation. Also, that before delivery to the consignee and while the boxes were in the possession of defendant, one of them was opened and a portion of its contents abstracted. The court charged the jury that they could not find a verdict for the plaintiffs, except upon the assumption that the property had been stolen or lost while in the defendant's possession, and that such loss must be found to be attributable exclusively to the negligence of defendant in delaying the transportation: *Held*, error. (*Canfield* agt. *B. and O. R. R. Co.*, 93 N. Y., 532.)
6. In a proceeding to foreclose a mechanic's lien, after trial before the court had begun, and near the conclusion of the direct-examination of the plaintiff, the owners demanded that the issues between them and their codefendants, who claimed as lienors, should be tried by jury. The court overruled the demand on the ground that it was made too late: *Held*, no error; that the right, if any existed, was waived by failing to claim a trial by jury before the production of any evidence (*Code of Civ. Proc., sec. 1009, subd. 4*); but *held*, that as the action was in equity no such right existed. (*Kennedy* agt. *Apgar*, 93 N. Y., 539.)
- TRUST.
1. Where C. died leaving an only daughter, named Ella, about eight years of age, leaving a last will and testament by which he gave all his property to this daughter,

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with the income and profits thereof; and by it he also desired his executor, the defendant S., to take charge of his property, rent out the real estate, take care of his household furniture and other property until his daughter attained the age of twenty-one years, and requested his executor should provide his child with a suitable home and see to her education and pay for the same out of his said property, and to sell and convey his real estate at any time during the minority of his said daughter, and also sell his furniture at any time in his judgment it will be for the interest of his said child. The defendant G. was appointed the general guardian of the child Ella and placed her at school with the plaintiff, and there is due to the plaintiff for board and tuition and supplies furnished to the child \$434.68. In an action brought to procure the application of the money of the child to the payment of the plaintiff's claim:

Held, that the fund in the hands of the executor is held in trust for that purpose and its application can be enforced by the courts.

Held, also, that it is immaterial what the action is called which is instituted to enforce this duty resting on the executor. There is now but one form of civil actions, the distinction between legal and equitable remedies being abolished, and if the case made by a party entitles him to any remedy it must be granted where an answer has been interposed even in disregard of the prayer for relief.

Held, further, that it was proper to make the infant child and her general guardian as well as the executor parties to the action. (*Bulkley* agt. *Staats*, ante, 257.)

TRUSTEES.

1. Where a creditor of a corporation seeks to charge a trustee person-

ally with a debt, upon the ground that in pursuance of the eighteenth section of chapter 611 of the Laws of 1875, he signed and caused to be filed an annual report which, as the complaint alleged, was false in a material representation, viz., that the whole of the capital stock of \$700,000 had been paid in full, when in fact it was issued in exchange for an interest in real property not exceeding \$200,000—it is not necessary to aver that the transaction was a fraudulent cover or the fictitious payment of the stock, or that the trustees had no actual belief in the value of the land, or no reasonable ground or basis for such belief, and that the issue of the stock for the land was done with the fraudulent purpose of evading the statute, when it is alleged the defendant knew the report to be false when he signed it. (*Taylor* agt. *Thompson*, ante, 102.)

UNDERTAKING.

1. There is no authority for the granting of an injunction restraining the enforcement of a judgment except on an undertaking providing absolutely for the payment of the judgment, with interest and costs. (*Fullan* agt. *Hooper*, ante, 75.)
2. Where a person signs an undertaking given on appeal in an action as surety, with the express understanding that it was to be executed also by another surety, and the law requires two sureties to an undertaking that would operate as a stay, such surety is not liable on the undertaking if it be filed without a second surety being obtained. (*Grimwood* agt. *Wilson et al.*, ante, 283.)

VAGRANT.

1. Section 892 of the Code of Criminal Procedure has been repealed or

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abrogated by the provisions of the consolidation act (*Laws of 1882, chap. 440*), and the filing of the record of conviction of a prisoner on a charge of being a vagrant, by a police justice in the office of the clerk of the general sessions of the peace is regular. (*Matter of Waters, ante, 173.*)

VENUE.

1. The plaintiff in his character as receiver not only seeks to recover the interest of S. E. in the estate of his father, which consists of both real and personal property situate in the city of New York, but also that a certain assignment executed by S. E. to H., which released an interest in such estate of said H. E., deceased, comprising real as well as personal property derived by S. E. under and by virtue of the will of his father. On motion to change place of trial:

Held, that the action is within that portion of section 982 of the Code of Civil Procedure, which is as follows: "And every other action to recover or procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real." (*Thompson agt. Heidenrich, ante, 391.*)

2. Where the defendants made a proper demand that the place of trial be changed to the city and county of New York, pursuant to section 986 of the Code of Civil Procedure, but omitted to serve a notice of motion upon the plaintiff's attorney within the ten days prescribed by such section:

Held, that under section 783 the court has power and will, in a proper case, relieve the defendant from the charge of laches in not serving notice of motion as required by section 986. (*Id.*)

3. This action was brought by the plaintiff against the defendant, her husband, to recover money alleged to have been received by him for her. At the time of the commencement of the action the defendant was, and for many years previous thereto he had been, a resident of the county of Kings. The plaintiff was at that time, and since July, 1881, had been a resident of Middletown, Orange county, living apart from her husband under an agreement of separation. She claimed to have left him on account of his cruelty and ill-usage: *Held*, that an application to change the place of trial from the county of Orange to the county of Kings, made by the husband, upon the ground that his domicile, and therefore that of his wife, was there fixed, was properly denied. The distinction between residence and domicile is recognized by the Code of Civil Procedure, and it is the residence and not the domicile of the parties which determines the place at which the action should be tried. (*Lyon agt. Lyon, 30 Hun, 455.*)

WILL.

1. Where a testator devised to his wife his homestead, "with the appurtenances, containing about fourteen and one-half acres of upland, exclusive of the water grant," the words quoted is a general description of the quantity of the upland, not taking into account the extent of the water grant, which was appurtenant to it, and the latter was not intended to be excluded. (*Wetmore agt. Peck, ante, 54.*)
2. Where, at the time of the execution of the will, the premises devised to the wife were unincumbered, and the testator afterward executed a mortgage creating a lien upon the property, the widow

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- must take the lands subject to the mortgage. (*Id.*)
3. Where the testator made a gift to his wife of \$50,000, in such securities left by him as she might select, if the securities out of which the legatee may select are inadequate, the residue must be made up by the general assets of the estate, and the bequest is entitled to draw interest from the death of the testator. (*Id.*)
4. Where a gift is made of an equal share of a certain sum to each of several beneficiaries, "or to their respective heirs," and one of the beneficiaries dies in the testator's lifetime, leaving children, the share of such deceased person does not lapse, but goes to his children. (*Id.*)
5. Where a devise of the residue of the estate is made to the widow for life in one clause, and in the following clause such residue is directed to be divided into five equal shares, and given a share each to five beneficiaries named, "or to their respective heirs," in the event that either legatee died in the lifetime of the testator, his or her heirs take the share of the person so dying. (*Id.*)
6. A lapsed legacy, not being in terms excluded therefrom, goes into the residuary, the income of which goes to the widow for life. (*Id.*)
7. The executors being, in addition to a power of sale of the testator's real estate, invested with authority to lease and to mortgage it, and to invest and reinvest the estate in such securities as they may deem proper; they are also trustees, and as such are invested by implication with the legal title during the life of the widow, and the provisions stated constitute an equitable conversion of the realty into personalty, with the exception of the specific devise to the wife. (*Id.*)
8. Though the legacies are made a charge upon the real estate, such charge does not affect the homestead devised to the wife; and the power and authority to sell is paramount to the charge of the legacies, and the lien in favor of the legatee will attach to the proceeds of the sale. (*Id.*)
9. Where the general scheme of the will of P. was the creation of a trust in the executors as trustees, the trust fund, comprising the whole estate, except as to certain legacies, all of which have long since been paid, during the lifetime of the testator's niece A. W. T., to whom was bequeathed a life annuity, payable in semi-annual installments, the entire property to be kept invested and remain together until her death. The testator then divided the residue of the income of the estate into ten portions, and bequeathed the same severally to ten persons, directing payments to be made thereof from time to time until the arrival of the time when two certain legacies were to be paid. This has been done and the said two legacies paid, and the residue of the income arising from the investments which make up the trust estate, is now being paid pursuant to the tenth clause of the will, which reads as follows:
- "Tenth. After the payment of the aforesaid legacies (meaning those last mentioned) * * * the remainder and residue of the income of my estate and property shall continue to be paid to (the said ten beneficiaries, naming them, including one J. W. W.), each having one-tenth part of the same. And this shall continue up to the time of the decease of my aforesaid niece A. W. T."
- "Eleventh. After the decease of my said niece A. W. T., and the payment of the aforesaid legacies, I order and direct that then all the residue and remainder of my estate and property shall be equally divided by

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my executors hereinafter mentioned between * * * (naming the said ten beneficiaries, including the said J. W. W.), each to have and receive one-tenth part of the same. And in case of the decease of either of the last mentioned residuary legatees, the part or portion which would go to such legatee so deceased, shall go to the child or children of the same; but if they have no child or children, then to the legal heirs of such legatee." A. W. T. (the life annuitant) still lives, but the said J. W. W. died on the 6th of April, 1883, leaving a widow and four children, all of full age, and a will which provides:

"Item 1st. I give and devise to my wife the legacy coming to me from the estate of P. Also all property of every description during her natural life (she, however, selling so much thereof as may be sufficient to pay my just debts). At the death of my said wife said property and estate to be equally divided amongst my heirs as the law directs."

Held, that upon the happening of the death of one of the beneficiaries to whom a share of the income was, by the terms of the will of P., made payable during the life of A. W. T., as provided for in the tenth clause of the will, the share of the person so dying should thereafter be paid to the legal representatives of the person so dying up to the time of the death of A. W. T.

Held, also, that the testamentary disposition made by J. W. W. of the legacy coming to him from the estate of P., carries his portion of the income bequeathed to him by P., and it should be paid to the person entitled to receive the same under his will. (*Morgan et al. agt. Williams, ante, 139.*)

10. Where a testator gave his real estate, after the death of his wife, to his four children, and their heirs forever, and provided that if any of them should die without

issue, then their portion "to return to the surviving heirs:"

Held, that no entail was created, and that the gift over to the surviving heirs, meant the heirs of the testator, and that the devise over, in the event of either of the children dying without issue, was valid. (*Ebbets agt. Quick et al., ante, 184.*)

11. In 1862, three sisters, Margaret, Mary and Sarah, were the owners in equal proportions of a large amount of real and personal property called the joint Burr estate. Margaret died in September, 1862, leaving a will by which she devised, on the death of her surviving sister, all her lands to executors until the sale thereof in trust at such times as they might deem for the benefit of the estate. She gave to them the proceeds of her lands and personal estate, not otherwise specially given, to pay legacies to various charities. Mary, who died in 1865, gave her real and personal estate to her executors after the death of her sister, and the rents, issues and profits of the estate to be sold by them were to be applied to the payment of residuary legacies to charities. The legacies referred to in Margaret's will are made payable within four years from the death of the survivor of the sisters. By a codicil to Mary's will the legacies to charities are directed to be paid within two years from the death of her sister:

Held, that these wills are not void under the statute against perpetuities, there being not in either of them any suspension of the absolute power of alienation of the real estate for more than two lives in being at the creation of the estate. (*Riker agt. Society of the New York Hospital, ante, 246.*)

12. Where there were but two subscribing witnesses to a will, to one of which a legacy was left, and the will could not be proven without the testimony of such legatee:

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Held, that the legacy to him was void. (*Matter of Brown, ante*, 289.)

13. To devise an estate by implication there must be such a strong probability of an intention to give one that the contrary cannot be supposed. (*Macy* agt. *Sawyer, ante*, 381.)

14. The gift by a testator to his widow of all the rents and income of his real estate during her life creates in her an estate in the realty itself. And where there are no duties charged upon the executors with respect to the collection of the rents or income of the real estate or its application, no estate or trust is created in them in respect thereto. (*Id.*)

15. A power given to the executors to sell the real estate of the testa-

tor may be so hampered with restrictions as to be wholly inoperative and may be disregarded. (*Id.*)

16. The gift of the rest and residue of the testator's estate to *his children, after the death of his wife*, raises a life estate therein by implication in the testator's wife. (*Id.*)

WRIT OF PROHIBITION.

1. Justices of the peace are "justices or judges of any court" within the meaning of section 13, article 6 of the constitution. Persons over seventy years of age are ineligible to office. Writ of prohibition is the proper remedy against a person acting as justice of the peace who is over seventy years of age. (*The People ex rel. Lawrence* agt. *Mann, ante*, 337.)

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